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THE MODERN LEGAL PHILOSOPHY SERIES

Modern French Legal Philosophy

THE MODERN LEGAL PHILOSOPHY SERIES

Edited by a Committee of the
ASSOCIATION OF AMERICAN LAW SCHOOLS

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MODERN FRENCH LEGAL PHILOSOPHY

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GENERAL INTRODUCTION TO THE SERIES

By the Editorial Committee

"Until either philosophers become kings," said Socrates, "or kings philosophers, States will never succeed in remedying their shortcomings." And if he was loath to give forth this view, because, as he admitted, it might "sink him beneath the waters of laughter and ridicule," so to-day among us it would doubtless resound in folly if we sought to apply it again in our own field of State life, and to assert that philosophers must become lawyers or lawyers philosophers, if our law is ever to be advanced into its perfect working.

And yet there is hope, as there is need, among us to-day, of some such transformation. Of course, history shows that there always have been cycles of legal progress, and that they have often been heralded and guided by philosophies. But particularly there is hope that our own people may be the generation now about to exemplify this.

There are several reasons for thinking our people apt thereto. But, without delaying over the grounds for such speculations, let us recall that as shrewd and good-natured an observer as DeTocqueville saw this in us. He admits that "in most of the operations of the mind, each American appeals to the individual exercise of his own understanding alone; therefore in no country in the civilized world is less attention paid to philosophy than in the United States." But, he adds, "the Americans are much more addicted to the use of general ideas than the English, and entertain a much

greater relish for them." And since philosophy is, after all, only the science of general ideas — analyzing, restating, and reconstructing concrete experience — we may well trust that (if ever we do go at it with a will) we shall discover in ourselves a taste and high capacity for it, and shall direct our powers as fruitfully upon law as we have done upon other fields.

Hitherto, to be sure, our own outlook on juristic learning has been insular. The value of the study of comparative law has only in recent years come to be recognized by us. Our juristic methods are still primitive, in that we seek to know only by our own experience, and pay no heed to the experience of others. Our historic bond with English law alone, and our consequent lack of recognition of the universal character of law as a generic institution, have prevented any wide contact with foreign literatures. While heedless of external help in the practical matter of legislation, we have been oblivious to the abstract nature of law. Philosophy of law has been to us almost a meaningless and alien phrase. "All philosophers are reducible in the end to two classes only: utilitarians and futilitarians," is the cynical epigram of a great wit of modern fiction.[1] And no doubt the philistines of our profession would echo this sarcasm.

And yet no country and no age have ever been free (whether conscious of the fact or not) from some drift of philosophic thought. "In each epoch of time," says M. Leroy, in a brilliant book of recent years, "there is current a certain type of philosophic doctrine — a philosophy deep-seated in each one of us, and observable clearly and consciously in the utterances of the day — alike in novels, newspapers, and speeches, and equally

[1] M. Dumaresq, in Mr. Paterson's "The Old Dance Master."

in town and country, workshop and counting-house." Without some fundamental basis of action, or theory of ends, all legislation and judicial interpretation are reduced to an anarchy of uncertainty. It is like mathematics without fundamental definitions and axioms. Amidst such conditions, no legal demonstration can be fixed, even for a moment. Social institutions, instead of being governed by the guidance of an intelligent free will, are thrown back to the blind determinism of the forces manifested in the natural sciences. Even the phenomenon of experimental legislation, which is peculiar to Anglo-American countries, cannot successfully ignore the necessity of having social ends.

The time is ripe for action in this field. To quote the statement of reasons given in the memorial presented at the annual meeting of the Association of American Law Schools in August, 1910: —

> The need of the series now proposed is so obvious as hardly to need advocacy. We are on the threshold of a long period of constructive readjustment and restatement of our law in almost every department. We come to the task, as a profession, almost wholly untrained in the technic of legal analysis and legal science in general. Neither we, nor any community, could expect anything but crude results without thorough preparation. Many teachers, and scores of students and practitioners, must first have become thoroughly familiar with the world's methods of juristic thought. As a first preparation for the coming years of that kind of activity, it is the part of wisdom first to familiarize ourselves with what has been done by the great modern thinkers abroad — to catch up with the general state of learning on the subject. After a season of this, we shall breed a family of well-equipped and original thinkers of our own. Our own law must, of course, be worked out ultimately by our own thinkers; but they must first be equipped with the state of learning in the world to date.
>
> How far from "unpractical" this field of thought and research really is has been illustrated very recently in the Federal Supreme Court, where the opposing opinions in a great case (*Kuhn* v. *Fair-*

mont Coal Co.) turned upon the respective conceptions of "law" in the abstract, and where Professor Gray's recent work on "The Nature and Sources of the Law" was quoted, and supplied direct material for judicial decision.

Acting upon this memorial, the following resolution was passed at that meeting: —

That a committee of five be appointed by the president, to arrange for the translation and publication of a series of continental masterworks on jurisprudence and philosophy of law.

The committee spent a year in collecting the material. Advice was sought from a score of masters in the leading universities of France, Germany, Italy, Spain, and elsewhere. The present series is the result of these labors.

In the selection of this series, the committee's purpose has been, not so much to cover the whole field of modern philosophy of law, as to exhibit faithfully and fairly all the modern viewpoints of any present importance. The older foundation-works of two generations ago are, with some exceptions, already accessible in English translation. But they have been long supplanted by the products of newer schools of thought which are offered in this series in their latest and most representative form. It is believed that the complete series will represent in compact form a collection of materials whose equal cannot be found at this time in any single foreign literature.

The committee has not sought to offer the final solution of any philosophical or juristic problems; nor to follow any preference for any particular theory or school of thought. Its chief purpose has been to present to English readers the most representative views of the most modern writers in jurisprudence and philosophy of law. The series shows a wide geographical representation; but the selection has not been centered on the

notion of giving equal recognition to all countries. Primarily, the desire has been to represent the various schools of thought; and, consistently with this, then to represent the different chief countries. This aim, however, has involved little difficulty; for Continental thought has lines of cleavage which make it easy to represent the leading schools and the leading nations at the same time. Germany, for example, is represented in modern thought by a preponderant metaphysical influence. Italy is primarily positivist, with subordinate German and English influences. France in its modern standpoint is largely sociological, while making an effort to assimilate English ideas and customs in its theories of legislation and the administration of justice. Spain, Austria, Switzerland, Hungary, are represented in the Introductions and the shorter essays; but no country other than Germany, Italy, and France is typical of any important theory requiring additions to the scope of the series.

To offer here an historical introduction, surveying the various schools of thought and the progress from past to present, was regarded by the committee as unnecessary. The volumes of Dr. Berolzheimer and Professor Miraglia amply serve this purpose; and the introductory chapter of the latter volume provides a short summary of the history of general philosophy, rapidly placing the reader in touch with the various schools and their standpoints. The series has been so arranged (in the numbered list fronting the title page) as to indicate that order of perusal which will be most suitable for those who desire to master the field progressively and fruitfully.

The committee takes great pleasure in acknowledging the important part rendered in the consummation of this project, by the publisher, the authors, and the translators. Without them this series manifestly would have been impossible.

To the publisher we are grateful for the hearty sponsorship of a kind of literature which is so important to the advancement of American legal science. And here the Committee desires also to express its indebtedness to Elbert H. Gary, Esq., of New York City, for his ample provision of materials for legal science in the Gary Library of Continental Law (in Northwestern University). In the researches of preparation for this Series, those materials were found indispensable.

The authors (or their representatives) have cordially granted the right of English translation, and have shown a friendly interest in promoting our aims. The committee would be assuming too much to thank these learned writers on its own behalf, since the debt is one that we all owe.

The severe labor of this undertaking fell upon the translators. It required not only a none too common linguistic skill, but also a wide range of varied learning in fields little travelled. Whatever success may attend and whatever good may follow will in a peculiar way be attributable to the scholarly labors of the several translators.

The committee finds special satisfaction in having been able to assemble in a common purpose such an array of talent and learning; and it will feel that its own small contribution to this unified effort has been amply recompensed if this series will measurably help to improve and to refine our institutions for the administration of justice.

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EDITORIAL PREFACE TO THIS VOLUME

By Arthur W. Spencer

France is doubtless, next to England, the country to which the people of the United States feel themselves most closely united by the ties of closely related political institutions, traditional beliefs, and inherited standards of taste and feeling. Apart from this affinity we should naturally look to a gifted and highly cultivated people like the French for light in nearly every department of life; and it would seem that in view of this close relationship we should be particularly receptive to all the influences of contemporary French thought, and nowhere more than in the treatment of the problems of law and the State. Here there is a marked propinquity of the institutions of the two countries, here French thought has lately exhibited a striking fertility, and here the opportunity to become better acquainted with views we are likely to find in large part acceptable is to be seized most gladly.

The powerful democratic movement of the nineteenth century seems to have culminated during the past twenty-five or thirty years in a series of most important social developments. What French writers are in the habit of describing as the "interventionist" idea has made startling headway, as may be observed in the rapid growth of social legislation. The old individualism feels itself assailed, and must look for weapons of defense; the expansive movement in the labor groups must also

seek arguments by which to vindicate the very large claims that it makes. All political beliefs are now on trial, challenged to prove their right to exist, and there are indications of a widespread effort to restate the cardinal principles of social philosophy in a form which will supply this need of criteria that can arbitrate the dispute between society and the individual. To perfect the Art of Legislation, and to hearten the practical jurist with a sense of the solidity of the structure upon which he labors, there is need of something approaching a complete revision of the scale of values in the moral and juridical realms — the values which are otherwise termed rights and obligations; and such a transvaluation of course involves a doctrine of rational law, of an ideal law which will itself furnish the criterion for the soundness of positive law, bearing the relation to it of the absolute to the relative. Such a rational law, in some respect similar to the "law of nature" of the eighteenth century, may in fact resemble it; but only superficially, for it need not be colored by the humanitarian and Romantic prejudices of the eighteenth century radicals, but may revert to that respect for an established social order, that sense of the continuity of ideal and positive law, which it showed in the doctrines of Leibnitz and Aquinas. Toward the conception of such an ideal law, implied in reality rather than in any metaphysical intuition, the modern French mind (retaining its revulsion against metaphysics, conceived when Comtianism was triumphant, but not shrinking from abstract analysis) appears to be tending. Such a tendency is often taken for one of "idealism," but the word is used in so many senses that one should guard carefully against exaggerating the contrast of methods between scientific realism and a widening rationalism careful to avoid transcendental or mystical interpretations of the world

of conduct, which is neither opposed to nor identical with the world of reality.

These remarks are designed to put the reader on his guard against supposing that the movement represented by those whom Duguit calls "the younger French school" has made an abrupt exit from the house of its fathers, or has roughly slammed the door in the face of Positivism. They are inserted as an intimation that too close a resemblance between the so-called idealism of contemporary France and the idealism of contemporary Germany (at least as the latter is frequently conceived) is not to be looked for. On the contrary, what is to be expected is a close relationship between Positivism and this new French school, which makes the transition from one to the other gradual rather than sudden, and permits the reader whose philosophical attitude has been formed largely by English empiricism to get his bearings in a new region with fair ease. Indeed, these more recent doctrines, — who knows? — may prove highly congenial to the American mind, and may even supply the foundation for a new, constructive attitude in this country toward the somewhat misunderstood problem of "natural law."

The distinctive character of French legal philosophy as a peculiar product of the French people, differentiated from the thought of other nations, brings the theoretical movement of the past forty years into sharp relief against the background of Continental speculation, and offers on that account an interesting focus for the American student's attention. The intellectual movement presented in this volume is distinctively French, not so much as an outgrowth of the French temperament, in accordance with a current personification of supposedly distinct national traits, as it is an indigenous product of French tradition, evolved only to a minor and unimportant

extent in response to foreign influences. Only one of the four authors exhibits any marked impress from an outside source, and in this case (that of Fouillée, perhaps the most typically French of all in temperament) the action of English empiricism is neutralized by the original force of his genuis. Charmont's attention is preoccupied with the writers of his own land, and Duguit takes much pains to controvert the teachings of the German school, whose doctrine of the law as sanctioned by State coercion he rejects. Demogue's numerous references to Jhering occupy only a subordinate relation to his lavish citations of contemporary French theoricians. Of course Kant has long been a basic element in French philosophical instruction, but his somewhat inane formality has merely piloted the voyager past certain initial difficulties and left him to choose his subsequent course. The influence of Hegel in France has not been strongly marked. The reaction to later idealistic systems, those of Schelling and Hartmann and the rest, seems to have been almost negligible. Despite the pioneering of Renouvier in Neocriticism, Neo-Kantianism in France, at all events in jurisprudence, is a highly uncertain quantity. Durkheim has been reproached for a fancied indebtedness to German speculation, but such a charge if given too sweeping a form is manifestly unfair. We are not now considering the "Spiritualists" of the early nineteenth century and the influence perhaps exerted at one time by Fichte, to which we shall come later. For a considerable period, at least, philosophical development in France, like the literary and artistic development, affords many evidences of the self-sufficiency of French culture.

Since the beginning of the Third Republic, when the last barriers in the path of Positivism were removed and the movement inaugurated by Comte and modified

by his successors attained a predominant influence, there have been signs of a continuous progress in a certain direction. This movement might be roughly described as one from Positivism to Rationalism. There is danger, of course, in the use of terms of wide and uncertain meaning, especially with reference to such a complex of tendencies and counter-tendencies as the many-sided intellectual life of the France of recent years. There is always a risk in applying a common name to groupings of individuals who show an endless range of divergence and interplay, giving rise to an aggregate that defies logical dissection and arrangement, despite an assumed essential similarity. This infinite complexity of French thought has been marked since 1890, so marked that critics have often felt the necessity of being chary of generalization. Varying subjective criteria may also be a factor in the problem; some readers of this book are likely to share Seillière's estimate of Fouillée's supposed rationalism,[1] though he may seem to us to reflect a transitional phase. In assuming that there has been a movement tending toward a certain culmination, of which movement the latest stage may be represented by Demogue, we have no desire to foster prejudice. Duguit's vigorous logic compels admiration, and Charmont's critical discernment disarms attack on his judgments. Let the word Rationalism be given a wide connotation, marking a general tendency in which all these four authors may perhaps share, rather than overdrawn contrasts between doctrines that should actually be grouped fairly close together.

Nor is the whole of the recent movement in legal theory contained in these writers; the works chosen for

[1] For a highly sympathetic account of *Fouillée's* theory of force-ideas, see the final essay in "Introduction à la Philosophie de l'Impérialisme" by *Ernest Seillière* (Paris, Alcan, 1911), 307ff.

translation compose a set of illustrative readings which ought naturally to stimulate wider study of a subject too broad to be completely set forth by four representatives. And the interest of these four writers arises not only from their own views, but also from their abundant allusions to the theories of contemporaries. While the direct exposition presents important types of speculation, the indirect mirrors the wide range and variety of contemporary production in a manner that could hardly have been surpassed in a different compilation of extracts. It is thus that the reader is led to appreciate the importance not alone of these four writers, but of the many others,—Tanon, Hauriou, Saleilles, De Tourtoulon, Picard, Roguin, Beudant, Gény, and the rest, who must also be studied before a comprehensive estimate of the significance of recent legal thought in France can be reached.

The European war is certain to have profound after-effects in every country, and no attempt to anticipate the cultural transformations that will be witnessed in the next decade can have value at this time. The prophecies which we hear from time to time are commonly marked by but a limited comprehension of so intricate a complex of phenomena. At the same time intellectual activities now suspended are likely to be resumed by the warring nations at the point at which they were discontinued, and for reasons which cannot here be detailed, juristic thought in France seems far more likely to undergo continuous development in an idealistic direction than to succumb to a Positivistic reaction. These considerations sustain the confident belief that the contemporaneous quality of the present volume may be retained for some time to come.

For the book presents the latest tendencies in the legal thought of France before the war. It may perhaps be no exaggeration to say that three of the authors have

produced their writings chiefly during the past five years, and that ten years ago they were almost unknown even to their own countrymen. The fourth, who belongs to an earlier generation, sustained his vigor of literary production till only a short time before his death in 1912, and his doctrine of "force-ideas" has exercised an important influence on the thought of recent years as well as on that of an earlier period. Fouillée's long and fruitful career as one of the representative philosophers of modern France results in a great abundance of materials for an extended bibliography, which does not need to be included in a volume concerned only with juridical matters. No such wealth of material is available in the case of the other three writers. Even the most fragmentary biographical information concerning them is difficult of access. Their fame has so recently been acquired that this very quality of freshness will perhaps atone for a paucity of information about their personality.

The translators of this volume were Mrs. Franklin W. Scott for the Charmont and Fouillée selections and Joseph P. Chamberlain, Esq., for the extracts from Duguit and Demogue. It may be remarked that of the four authors whose writings are here reproduced M. Demogue was the only one whose text offered any particular difficulty. In this case the work of the translator was somewhat increased by the concentration of the author's style and by his numerous references to technical principles embedded in the French Civil Code. The editor has taken special pains to check up the English text of the "Fundamental Notions," and has carefully compared the entire translations with the originals. He therefore does not seek to evade his share of the responsibility for inaccuracies or inelegancies that may be discovered in any portion of this volume.

Alfred Fouillée, member of the French Institute, was born at La Pouëze, Maine-et-Loire, October 18, 1838. He completed his studies at the lycée at Laval, and for some time taught in Paris as an unattached professor. After teaching at Louhans, Dôle, Auxerre, and Carcassonne, he obtained honors in 1864 in the revived philosophical "concours d'agrégation" and was successively appointed professor in the lycées of Douai and of Montpellier and in the Faculty of Letters of the University of Bordeaux. Called to Paris as master of conferences at the École Normale Supérieure, he was forced to retire by failing health and threatened eyesight in 1879, and thenceforth devoted the greater part of his life to literary production. He died at Lyons July 16, 1912.

The germ of Fouillée's philosophical system is found in his doctorate thesis of 1872 on "Liberty and Determinism," read at the Sorbonne, a work which passed into several editions. This exhibited that attempt to reconcile naturalistic determinism and psychological freedom which was to be the dominant purpose of his later writings. His next work of importance was his "General History of Philosophy," which was likewise re-issued in many editions, and became a classic textbook of philosophical instruction in France. In 1878 he published the volume on "The Modern Idea of Law," the larger part of which is here translated. This was, as the writer avowed in his preface, an effort to prolong the ethical discussion which had found place in his doctorate thesis into the field of social and political life, treating of "the same question transferred from the moral to the social and political order"; an incidental purpose was to vindicate the ideal of France, as he understood it, in the face of the pretensions of other nations.[2]

[2] "The ideal of Germany was primarily — at least originally — religious and metaphysical; that of England was primarily political and

This work has gone into several editions. Thenceforth Fouillée produced a large number of books in which his theory of force-ideas was developed, and contemporary movements in morals, and in general philosophy treated particularly from the moral point of view, were examined. In his later life he devoted the greater part of his attention to political and social questions of the day. He urged the retention of the classics in the educational curriculum, and advocated reforms in the French parliamentary system designed to achieve greater democracy. Like Duguit he favored proportional representation and the "scrutin de liste."

Besides his own books Fouillée also edited issues of the "Republic" of Cicero, the "Memorabilia" of Xenophon, the "Manual" of Epictetus, the "Theodicy" of Leibnitz, and the "Logic of Port-Royal" of Arnauld, as well as a collection of "Extracts from the Great Philosophers" (1877). He also edited the posthumous works of his stepson Guyau (1889 and 1895), a writer by whom he is recognized to have been influenced.[3]

Fouillée's position strongly suggests that Fichteanism to which Brunetière referred, with an evident lack of sympathy, when he remarked: "Dare we say that it is not with Kantianism, properly speaking, but with Fichteanism that contemporary French philosophy is and continues to be impregnated?" [4] Fouillée exhibits a type of introspective humanitarianism which might seem the product of a fusion of the Fichtean and Rousseauist traditions. But the period of the seventies, when the foundations of Fouillée's system were laid, was one of Positivistic influences which an idealistic philosopher could harly resist. These influences infil-

economic; the ideal of France is primarily social and humanitarian." Part i, chapter ii, p. 14 post.

[3] For a list of works, see end of this preface.

[4] "Sur les Chemins de la Croyance" (Paris 1907), 9.

trated into his system, which represents an attempt to establish a modus vivendi between Positivism and idealism.

Consequently Fouillée represents a contracting, receding form of this Fichteanism. He rejected the old "Spiritualism" as appealing to "metaphysical entities . . . as sterile with regard to the question of legal right as to that of moral freedom,"[5] and as favorable to aristocratic tendencies.[6] He reacted against the Kantian influence by misinterpreting and rejecting the "transcendentalism" of Kant,[7] and by objecting to what he calls his "mechanism"; but the theory of immanentism that he substitutes, constituting a bond between Fouillée and Proudhon,[8] shows his response to the Positivistic influence to have been qualified,[9] and explains that element in his teachings which to some has suggested Platonic influence.

When Fouillée writes of "The Modern Idea of Law," it is primarily to express the attitude of a humanitarian moralist. "Droit" in French meaning either law or right, legal right is readily treated purely from the moralist's point of view. When we take into account Fouillée's egalitarianism, his devotion to the glittering formulæ of the French Revolution, his enthusiastic championship of somewhat hazy general maxims of social life, and his ardent adulation of the emancipatory vocation of the French people, we must recognize a strong inclination toward a certain kind of Romanticism. This Romanticism is of the altruistic form, it is humanitarianism in morals and democratism in politics. It is not a Romanticism because of its attitude toward reason

[5] Preface to "L'Idée Moderne du Droit," ii.

[6] Part ii, chapter i, post.

[7] Preface to "L'Idée Moderne," iv.

[8] §§39, 148 post.

[9] For *Fouillée's* contact with *Fichte* see "L'Idée Moderne," 30, 163 (not here translated).

itself, but because of its application of reason; in the abstract, apart from its concrete applications, Fouillée's psychological Rationalism has much to commend it. But the type of Rationalism that permits such misapplications is scarcely to be called critical: it is not so keen as that of Demogue in detecting the flaws in the doctrinaire foundations; in its naïve simplicity it admits a great amount of unconscious fiction.

What is most to be admired in Fouillée is his clear perception of the fact that the wonderful expansion of empirical science, in the nineteenth century, was not an attack on the foundations of an analytical science of concepts, but that the two should collaborate in the formation of a comprehensive philosophical doctrine. This purpose of harmonizing realism and idealism was a lofty one, but it was conceived perhaps a little too soon, when the psychological and gnosiological technic now beginning to be available was undeveloped. It is hard to see how any real monism can be achieved without carrying the psycho-physical parallelism to its remotest applications, and one does not discover recognition of this parallelism in Fouillée. The result of such a structural want is to leave the idealistic side of Fouillée, which is the dominant side, suspended as it were in mid-air, as an autonomous system of grandiose moral intuitions. Fouillée thus follows the example of many eclectics before him, in contriving what is not a real synthesis, but only a mélange of seemingly opposed philosophical tendencies. The natural dualistic consequences of this attitude are to be looked for in Fouillée's treatment of rational law, the gulf between which and positive law is falsely magnified, recalling the tendency of the eighteenth century.

Fouillée's Romanticism makes him a doctrinaire when he approaches the subject of freedom. He takes unnecessary pains to vindicate the necessity of an expand-

ing freedom for the moral life, and his conception of the manner in which humanity advances from automatism to freedom is highly artificial.[10] The problem of freedom, in the form in which he states it, lacks vital importance for ethical theory. Fouillée's insistence on the fundamental character of this problem betrays the ascendancy of the Rousseauist doctrine that "the free will is the essence of man." [11] It shows (as Tarde says) that Fouillée, like Kant, is anxious to preserve Duty at any price.[12]

The doctrine which he called the "evolutionism of the force-ideas" carries with it the implication that the ideas which present the chief goals of human effort derive their force, not from the particular mental state of the willing agent at the moment he wills, but from a rational content of the particular volitional ideas which is assumed to have a general validity independent of the willing agent. Here, again, the fault is more with Fouillée's application of his theory than with the theory itself. We might postulate this universal validity of certain teleological conceptions if we could generalize those conceptions from the content of the particular volitional ideas. But a careful survey of the volitional experience of the race, and a cautious attempt to formulate generalizations that will accurately cover all past and present subjective phenomena, will yield nothing approaching in clearness of definition the ideas which Fouillée presents to us as the "idées directrices." The emphasis on those inane abstractions, liberty and equality, is characteristic

[10] *Brunetière* takes issue with *Fouillée's* three degrees of solidarity, predetermined and automatic, consensual, and free, failing to see how an automatic act can be transformed into a free one. "L'Idée de Solidarité," in "Discours de Combat," 2d series (Paris 1903), 67-8.

[11] § 30 post. (Cf. p. 27 of French edition).

[12] See *Tarde's* remarks on *Fouillée's* views with regard to determinism and "force-ideas," in his "Penal Philosophy," vol. 5 of Modern Criminal Science Series, 13.

of Fouillée, if not of the French mind in general. Such general ideas, to acquire a vital meaning, need to be supplemented by concrete conditions. The practical problems of everyday morals and justice are more of ways and means for the attainment of obvious ends than they are of the formulation of ends. The final concepts of happiness, welfare, or order, explain themselves solely by the things which must be done for their realization. The doctrinaire theory of force-ideas is thus tinctured with mysticism and has a defect which betrays one of the dogmatic consequences of dualism.

Joseph Charmont has been Professor of Civil Law in the Faculty of Law of the University of Montpellier for upwards of twenty years. He appears to have published few books if any before 1907. Since then his writings have been largely concerned with French private law, but he has also written two books of a less special character treating of law in its larger social aspect. Of one of these the last half is translated in this volume, particularly on account of its clear résumé of recent movements in French legal thought, and to bring into prominence that idea of an idealistic renascence which is the keynote of the author's discussion.[13]

It is significant that Charmont does not give his own unqualified support to most of the recent doctrines which he reviews, whether Solidarism, or Pragmatism, or "free scientific research," or the theory of Duguit.

He finds that Solidarism is entitled to be called a form of idealism, because the later Solidarists have recognized that solidarity as an external fact cannot supply any ethical criterion; solidarity must itself conform to the idea of justice. Solidarity, itself, cannot supply a principle of morals. Solidarism may, however, enlarge our

[13] For a list of his works see the end of this preface.

conception of individual right, and may mediate between the extremes of individualism and socialism. Only time can tell, says Charmont, whether Solidarism, whose force of expansion he considers to have diminished, will be able to serve as an ideal for a democracy bent on sound reforms. He says that its teachings are somewhat vague, but for that very reason more elastic and more capable of enlisting the support of different kinds of people.

He objects to Pragmatism as confusing the useful and the true. But "we are all more or less Pragmatists, in the sense that we seek to formulate an opinion compatible with the end and conditions of action." Charmont, however, shows that he is to be classed with the rationalists; he finds the exaggeration of the Pragmatist doctrine to consist in its rejection of the control of reason.

He objects to Gény's doctrine of free judicial inquiry as militating against the principle that the statute is to be treated as above everything else the expression of a declared will; he also says that it would tend to the production of a formless legal system which would be deprived of unity and coherence by the opportunity given the individual judge for arbitrary solutions of his own. But he seems to approve of Gény's break with the historical school in treating justice as a product of the reason.

He criticises Duguit for rejecting the notion of individual or subjective rights, and for various artificial dogmas into which his Positivism leads him. He finds, however, that Duguit is an unconscious idealist, because he really believes in a natural justice but poorly disguised by his concept of solidarity.

These criticisms show an eminently sane point of view, free from excesses both of dogmatic Positivism and of romantic idealism; roughly, it is the rationalistic conception of natural right rather than the notion commonly

ascribed to Rousseau with which Charmont is preoccupied. Neither in the chapter on "The Conflicts between Law and the Individual Conscience" nor elsewhere in the book, however, does Charmont give definite form to a rationalistic doctrine.

Obviously the recent developments of which Charmont writes illustrate the tendency to a renascence of legal idealism instead of supplying actual examples of such a thing. Leaving Stammler's natural law with variable content out of account, which is hardly an indigenous product of France, not one of these doctrines is to be regarded a distinct form of juridical idealism. The only one which does not make compromising concessions to Positivism, Gény's theory of free judicial interpretation, is chiefly concerned with judicial technic and gives great emphasis to the contingent element in the formulation of law. What chiefly interests Charmont is a tendency that he discovers in legal thought, which leads him to anticipate a time when the two opposite notions of individual and community rights will be integrated with each other in an orderly and harmonious system of rational justice. Whether such a synthesis is to be contingent, the fruit of cumulative experience, or analytical, the work of the philosopher, is something on which he expresses no opinion.

It is with a mistaken notion that one looks to that "renascence of idealism" (often pointed out by Brunetière and many other writers as showing itself in the early nineties, not in legal theory alone but elsewhere) for a sharp differentiation of new tendencies radically in opposition to the thereto prevailing Positivistic doctrines. That term is rather to be understood as denoting a complex of reactions, within as well as outside Positivism, which not even at the present time, in their latest phases, are easily to be made to converge into a single,

clearly outlined type that answers to the description of an idealistic doctrine. The past two decades have been a period marked in the main by rebellion against the excesses which were found to have been brought about by Positivism in science, by externalism in morals and history, and by naturalism in art. To this reaction Charmont himself clearly belongs.

Léon Duguit, Professor of Constitutional Law at the University of Bordeaux, has like Charmont held a chair in the law faculty of his university for upwards of twenty years. His first important work which we have been able to discover was "The Constitutions and Principal Political Statutes of France" written in collaboration with Henry Monnier in 1898. His writings have dealt almost wholly with the subject of public law, treated largely, however, from a philosophical point of view, even in such of his works as aim merely to expound the special topics of French constitutional law. Duguit seems to have preceded these technical manuals, however, with studies in which the theoretical foundations of his later practical expositions were firmly laid. He published in 1901 and 1903 his two volumes of "Studies of Public Law," from the first of which extracts are made for translation in this volume. This first volume contains a comprehensive exposition of his leading principles, and is the best book to read to understand his general doctrine of the nature of law and its relation to the State. These views were further elaborated in the course of lectures delivered at the École des Hautes Études Sociales and published under the title, "Le Droit Social, le Droit Individuel, et la Transformation de l'État." His treatise on constitutional law, issued in 1907 and much enlarged in 1911, reiterates the theory of the State earlier set forth. In 1912 Duguit turned

his attention to a fuller examination of private law than he appears to have made before that time, but in 1913 he returned to his major subject with a luminous study of recent developments in French public law, "Les Transformations du Droit Public." Emphasis may well be laid on the fact that it is not only as a theoretical jurist that Duguit commands attention; his treatise on French constitutional law is classed with Esmein's as one of the two best recent manuals of this subject.

Duguit rejects Durkheim's notion of a social mind. Everything must be expressed in terms of individual mind. Social solidarity exists; the society and the individual are correlative, increasing socialization meaning increasing individualization. There are no a priori individual rights, there are only objective (positive) rights. There is an objective rule of law or right which is contained in the concept of solidarity itself; for this concept offers a rule of finality — conduct must be adequate to the end of social solidarity. This rule of law is imposed upon men not by any inherent moral validity, that being a metaphysical conception, but by virtue of the positive fact of social solidarity. Some men, more enlightened than others, recognize the rule of law when it is not recognized so clearly by the great mass of their fellows, whence results the distinction between morality and law. The State is not a subject of legal rights, as the conception that a subject must exist as the possessor of rights is metaphysical. The State in this sense is only a fiction or hypothesis, for which realistic legal science has no use. Actually the State is nothing but any human society in which there is political differentiation — that is, a differentiation between those who govern and those who are governed.

Duguit, though he rejects the chief positions of the important modern sociological school of which Durk-

heim is the head, is nevertheless perceptibly influenced by that school in his treatment of law and morality as social facts imposed upon the individual externally. He adopts the same "imposition" idea which Durkheim and Lévy-Bruhl find serviceable as a makeshift for internal obligation. Thus there is something similar in his manner of proceeding to bridge the abyss dividing the world of fact and the world of value — between the "enunciative" and the "normative."

Ultra-Positivism gives rise to metaphysical dogmatism in Durkheim [14] and Lévy-Bruhl, and in spite of Duguit's rejection of their type of sociological doctrine, he shows a similar tendency to mistake fictions and hypotheses for objective facts. Thus the solidarity which Duguit and Durkheim both postulate to be a fundamental fact is far from being complete in actual social life, which shows a great deal of misadaptation and want of harmony. Actual human society certainly presents no perfect organic harmony and unity of structure which can serve as a foundation on which to erect a positive social morality. Demogue's treatment of solidarity is much more satisfactory, because it is more realistic. Of positive social morality unity and distinctness of form cannot be predicated; it is rather an amorphous mass of contradictory and infinitely divergent natural "rules of law." Duguit's one "rule of law" is accordingly a fiction; his doctrine founders on the rock of Scholasticism it seeks to avoid. It revives the natural law dogma in a new form, highly repugnant to the rational law of a pure ethical science untainted by Positivistic aberrations.

[14] "The sociology of M. *Durkheim* ceases to be a sociology, and resembles a sort of blind algebra, in that, as a consequence of Positivism, M. *Durkheim* has emptied social symbols of all intellectual content." *Tarde*, RMM Jan. 1895, quoted by *Leguay*, "Universitaires d'Aujourd'hui" (Paris, Grasset, 1912), 299.

These defects, however, are very far from wrecking Duguit's theories of law and the State. Ingenuously blind to the latent anti-Positivistic trend of his conclusions, he nevertheless furnishes a most interesting example of the ingenious and resourceful application of an inadequate and outworn method. A large part of the analytical structure he erects is of firm, durable construction, and actually he is less of an iconoclast than he seems to be at first glance. To a large part of his teachings, developed as they are with much logical force, the objection is not so much that they are false as that they are not the whole truth. The doctrine that the personality of the State is only fictitious, for example, needs to be supplemented by a doctrine which recognizes the utility of such a fiction — if it is to be no more than that — in public law. The notion of a positive "rule of law," which is only a latent law at the root of an existing social order, needs to be supplemented by a more profound analysis of that other law which is consciously set in motion by a society organized with the very purpose of maintaining its supremacy. As soon as the reader places himself in a sympathetic position which permits him to recognize the relative validity of Duguit's teachings, as useful studies of certain aspects of juridical phenomena, he will feel that the work of this writer has in many respects constituted no slight contribution to a rational theory of law. His attitude, moreover, is one of wholesome detachment from the political controversies of the day; he is a Solidarist untainted by Rousseauism and indifferent to the practical expedients his Solidarism offers the politician, and his rejection of the principles of the French Revolution is unmistakable.

René Demogue's earliest work, the cornerstone of his reputation, seems to have been his "Civil Repara-

tion" ("De la Réparation Civile des Délits"), published in 1898 and crowned by the Faculty of Law of Paris and by the Academy of Legislation of Toulouse. Three years later he wrote his "Attempt at a General Theory of Subrogation." He contributed articles on private law to the *Revue de Droit Civil*. About 1902 he became Professor in the Faculty of Law of the University of Lille, his latest designation being Professor of Civil and Criminal Law in that institution. His earlier publications suggest the legal specialist more than the creator of a general theory of law. In 1906 he published a short work on "Contingent Rights" ("Des Droits Éventuels") which has a certain significance from a philosophical standpoint. By far his most important production in which his theoretical position is for the first time clearly developed, is the "Fundamental Notions," appearing in 1911, the first two hundred pages of which are here translated in their entirety. This, so far as we have discovered, is Professor Demogue's latest book.

Demogue is remarkable for a happy way of brushing aside the veil of fiction and illusion that obscures the realities behind familiar concepts. In the facility which so readily pierces these illusions is a great keenness and clearness of vision. He has a felicitous manner of passing in review a bewildering procession of images, of presenting with kaleidoscopic variety a rapid succession of different perspectives of the same object. He is one of those writers who appear not so much to work out a preconceived plan as to develop their theme spontaneously as they move along; this he does with a singular swiftness and concentration of thought, with a rare impressibility striving always to reproduce the nuances of a complex reality. The preconceived design, however, is certainly there, and may be grasped by gauging the final result of this accumulation of particular impressions

which form the materials of an elaborate yet thoroughly coherent logical structure. Of this informal mental habit there are two types: the bellettristic is the more familiar, leading, as in the case of Mr. Henry James, to a careless and purposeless intellectual curiosity that is content to grope for reality without trying to seize and retain it as part of a formal construction. But there is also another kind of analytical improvisation which is dominated, unlike impressionism, by a passion for the construction of a complete, objectively valid, adequate definition of the complex studied, by the purpose of seeking a fruitful realistic interpretation that shall faithfully mirror the intricate actual relationships from which the formulated conception must derive its value.[15] This superb realism which wins Demogue the admiration of his reader throws a clear, white light into the obscurer regions of jurisprudence; it makes for a sharper division between the real and the fictitious, between science and dogmatism, than we find in most discussions of the essential nature of juridical principles. By dissolving fictions it supplies a technic of legal theory that is instructively applied and that is likely to be imitated with fruitful consequences by others who are forced to acclaim its value.

Associated with this method is a philosophic detachment. Wary of illusions, Demogue neither follows the Solidarists in one direction nor the old-fashioned individualists in another. Demogue thus attains, if not the goal of a pure rationalism, a position well advanced on the road toward it.[16] His law of nature — a term he is

[15] Cf. *Bergson*'s interesting characterization of *Tarde*, quoted by Mr. Lindsey in *Tarde's* "Penal Philosophy," vol. 5, Modern Criminal Science Series, xxv.

[16] *Tanon* is an interesting subject for comparison in this connection. For an example of his work, see his valuable estimate of *Jhering* appended to "The Law as a Means to an End" in this Series.

willing to admit if it can be freed from its eighteenth century connotations — a thing of changing and uncertain content and of most varied concrete manifestations, is not a positive "rule of law"; it is a rule of law not directly accessible to mankind, but only to be sought for in the struggle to achieve harmonious adjustments of social life. It is therefore an ideal law rather than a positive law. It is here that he shows himself not a follower of the Positivist school.

While Demogue affirms the utility of the valuable though incomplete teachings of the Historical and Positivist schools,[17] he sets himself in opposition to the Positivists by insisting that their method leaves a void in the science of morals. Law and morality, he says, cannot ignore the central problem of the object and meaning of life; they must get into this question "either frankly or surreptitiously." As Demogue aptly observes — and the observation is one that pluralists should heed and that goes far toward atoning for that pluralistic tendency of which there are perhaps traces in Demogue's own teachings — "the improvement of conduct [mœurs] or of law must be directed toward a fixed object, or the relative will not indicate a relation with anything, which is inconceivable."

There is a kind of agnosticism in Demogue's treatment of the problem of the absolute. He considers the ideal law most difficult to discover because of the absence of any generally received criterion. When thought to have been discovered it will be imperfect. This ideal law, he believes, is to be approached in the actual strife of wills, and in the conscious comparison and recon-

[17] For the recent reaction against these schools, see the sections on "The Revival of Natural Law in France" and "The Stage of Unification," in Professor *Pound's* "The Scope and Purpose of Sociological Jurisprudence," 24 *Harvard Law Review* 591 and following volume, at pp. 159 and 509.

ciliation of the principles of action. Demogue, however, is not a believer in a merely contingent, technical, or empirical harmonization of divergent principles. He quotes, with some apparent approval, Hauriou's remark [18] that there are three means of avoiding contradictions — partial elimination, synthesis, and compromise. But he does not believe in always forcing contradictions to a trial of strength [19]; there may be advantages sometimes in "decentralizing" the conflicts. As the rôle of synthesis is not excluded an anti-intellectualistic position is not here distinctly developed, though possibly implied to a certain extent.

"This ideal state of law in the presence of certain social facts, historical, economic, and other, will be always imperfect, for law is created to respond to actual needs whose relative importance is hard to establish, and also to respond to every one's taste." There is in this something suggestive of the anti-intellectualistic position of Tarde in treating the problem of moral duty as simply one of feeling and desire. Laws, according to Demogue, must look "to the satisfaction of human tastes, to the realization of varied conceptions of life." But while Demogue at times suggests a resemblance between his theory and Merkel's theory of the compromise character of the law, Merkel goes further when he says:[20] "Law in its essence, and not by way of exception, here or there, but always and everywhere, has an alogical nature." Merkel's realism here leads him into anti-intellectualism. On the other hand the general atmosphere of Demogue's exposition, including the authors whom he cites, strengthens the impression that he is at least an eager spectator of attempts to discover some higher basis for

[18] Part ii, chapter xii, footnote 92 post.

[19] Ibid., footnote 87.

[20] "Law as a means to an End," in this Series, 452.

the integration of ideal law than the Pyrrhonic doctrines of contingency and of compromise could ever yield.

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INTRODUCTION

By John B. Winslow[1]

Lovers of Thackeray will doubtless remember the surprise and disgust with which Mr. Yellowplush viewed the amazing ignorance of the French people on the most commonplace subjects, and they may, perhaps, recall his final generalization on the subject, as vigorous in its expression as it was vicious in its orthography, which ran thus: "The moor I travvle, the moor I see of the world and other nations, I am proud of my own, and despise and deplore the retchid ignorance of the rest of Yourup."

Perhaps it would not be correct to say that this fairly represents the attitude of the Anglo-Saxon mind towards Continental thought, but it would be entirely correct to say that like all good caricatures it has a very solid basis of fact.

The average Englishman has always had a robust contempt for foreign customs and institutions so far as they differed from his own, and an abiding conviction that there can be no ideas even approaching in excellence English ideas. In addition to this he frequently has a feeling of genuine pity for those who have not been fortunate enough to be born under British laws and institutions. We in America have been much inclined to share in these ideas. However much we may criticize our English brethren, we have always been proud of our

[1] Chief Justice of the Supreme Court of Wisconsin.

lineage, boastful of our so-called Anglo-Saxon birthright, and profoundly sorry for those unfortunate races which have been obliged to make shift without those blessings.

This attitude of mind has certain well understood advantages. The great leaders of men have always had supreme confidence in the soundness of their own conclusions; the great leaders among the nations always have been and always will be egotistical nations.

But this is not the mental attitude of the true philosopher, and legislators and jurists ought above all things to be true philosophers, for the law which is not philosophical is not law in any true sense, but only an arbitrary whim tricked out in the garb of law. The philosopher welcomes truth whatever its source; he realizes that he has no monopoly upon it and he is not ashamed to acknowledge the fact.

It is quite certain that the American bar as a whole has been slow to believe that anything good could come out of the Nazareth of Continental legal philosophy or that there could be any substantial merit in any legal system not founded upon the common law of England.

The Great Charter, wrung from the unwilling hand of John at Runnymede, declares that "no freeman shall be taken or imprisoned, or disseised or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by *the law of the land*."

The words "law of the land" had a certain and fixed meaning at that time as now, though it was difficult then as it is now to set the exact limits of their meaning in a given case. That meaning included, of course, not only the meager statute law of the time but also many ill-defined but generally recognized rules of property and conduct which rested not on legislative or

executive fiat, but on long continued custom and precedent. These rules were customs indeed rather than laws; customs dating back into the remote past and which had been evolved slowly "line upon line, precept upon precept, here a little and there a little"; customs not written down or officially proclaimed but recognized as embodying the natural and God-given rights of Englishmen everywhere. They were largely the result of judicial precedents which, although not preserved in printed reports, were handed down from generation to generation, imperceptibly acquiring the sanctity that goes with age.

It goes without saying that the following of precedent has been one of the distinctive marks of the English legal system and of all other systems founded upon it. Not that the idea has been absent from other legal systems, but simply that it has not acquired that greatly preponderant influence in them which it has acquired in the Anglo-Saxon systems. The advantages arising from the systematic following of precedent are undeniable. Stability in the law is a desideratum which can hardly be overestimated, and the following of precedent strongly tends toward stability and certainty. It has been said with truth that upon many questions it is more important that the law be settled in some way than it is that it should be settled in any particular way.

Valuable in this respect as is the effect of the following of precedent, it must still be admitted that it has also disadvantageous effects which ought not to be minimized or forgotten.

Chief among these effects is doubtless the inevitable tendency to obey its dictates implicitly at the expense of reason. Such obedience to precedent fetters the intellect and sets arbitrary bounds to the flight of human thought. Under its influence the lawyer is likely to

become a mere searcher of digests, a slave of card indices. Confronted with a client and an actual case, he begins at once a feverish search for a similar case in that vast and ever increasing store of precedents which is at once our boast and our despair; and, having found it, he too often rests content therewith and metaphorically checks his reasoning powers at the parcel counter as he enters the court room to try his case.

So, too, with the legal text-books of the time. Under the extreme development of the rule of precedent they have become, with a few notable and welcome exceptions, mere compilations of precedents, while the lawyer's shelves fairly groan with cyclopedias whose merits are measured by the number of precedents which they cite.

If our civilization were fixed, our political, social and economic conditions unchanging and unchangeable, the unquestioning following of precedent would be endurable if not absolutely desirable, but the conditions are not fixed. The race has never stood still nor has its progress ever been so rapid as within the past half century. The simple life has gone or is rapidly going; the complex life is here and the precedent which served its day and generation well may fail miserably when it is attempted to apply it to the solution of modern problems. Consciousness of this fact has been somewhat slow in coming, but it has come at last. We realize quite generally that the common law, *i.e.*, the law of precedent, is not able to deal successfully with very many of the pressing questions of the present day either civilly or criminally, and that neither English nor American jurists have sounded the depths of legal philosophy.

So also we realize that we are now in the midst of a period of great legislative activity arising from the attempts which are being made in every legislative body to adjust the "law of the land" so that it will more

satisfactorily meet the changed conditions. There are some who seem to believe that this activity will be short-lived and that it will have little permanent effect, but he who has any adequate conception of the movements of the time must realize that it will continue for many years, and that our future must largely depend upon the wisdom of the men who control it.

Lawyers have always borne an important, if not a controlling part in the legislation of our American states, and it is to be expected that they will continue to bear that part in the future. Shall these legislator-lawyers be of the digest and card index variety, or shall they be philosopher lawyers who have endeavored to make some study of the springs of human thought and the causes of human action? Shall they be men whose legal education has been confined to the narrow compass of the decided law of England and America, or shall they be men who have in addition made some study of the legal philosophies of continental Europe?

These questions really admit of but one answer. So long as we rested securely in the belief that the English common law was a sort of divinely ordained institution, capable of meeting and solving every problem, there seemed to be no need to examine the legal philosophies of other nations for help; but with the confession on our lips that the common law is not all-sufficient and that it must be supplemented by legislative action on a considerable scale, the desirability, — nay, the necessity, — of the study of other systems becomes at once apparent. This does not mean that the foreign legal philosopher has satisfactorily solved all the problems of modern life, or that he has said the last word on the subject, but simply that he has made earnest attempts to solve those problems from viewpoints different from our own, and that the mind which is seeking for truth on great ques-

tions cannot afford to ignore the independent studies of other minds seeking the same truth amid different surroundings and conditions.

I do not feel that it is any part of my duty to attempt a review of the present volume. The authors from whose writings its contents have been taken represent different schools of French thought, but all command the close attention of the thoughtful reader, and all are stimulating to the intellect even though they may not be compelling to the judgment.

The important question is not whether M. Fouillée be right in his contention that French legal philosophy is the philosophy of liberty and social justice, or whether we agree with M. Duguit's idea that the modern State has broken down and must be supplanted by a different social order. The important question is whether the minds of American jurists and lawmakers shall be so stimulated and their mental outlook so broadened by careful study of this volume and others of similar character that they shall approach the great tasks which lie immediately before them not merely as lawyers, striving to adapt old precedents to new problems, but as constructive thinkers as well.

INTRODUCTION

By F. P. Walton[1]

This series and the sister series on Continental Legal History are symptomatic of a widening of the lawyer's horizon. It may be said without serious disregard of truth that English-speaking lawyers of the last generation took but a slight interest in the history of any other law, except perhaps that of Rome, and regarded legal philosophy with unconcealed aversion. Nor was this attitude inexplicable. The admirable histories of law, English, French, German, Italian, which are now on our shelves have almost without exception been produced within the last thirty or forty years, and the older works on legal philosophy were written with so little reference to the actual law that they made no appeal to the practical lawyer.

Moreover, though it sounds paradoxical, the lawyer of thirty years ago was more overwhelmed by the law reports than the lawyer of to-day. In England, and still more in America, the mountainous mass of reported cases crushed his spirit. It seemed hopeless to keep up with the decisions, and absurd to range further afield. The mass shows no sign of diminishing, but we see now more clearly that exclusive attention to the reports does not produce the best legal minds.

Out of the welter of cases a system must be created, and some grasp of legal history and of legal philosophy

[1] K.C., LL.D., of the Khedivial School of Law, Cairo, and formerly Dean of the Faculty of Law in McGill University, Montreal.

helps the student to make such a system for himself. Once this truth has penetrated, the value of Continental writings becomes evident. French lawyers especially have had a better chance of presenting the law in a logical way as a series of deductions from a small number of fixed principles.

The remarkable development of the French law since the Code Napoléon has been in the main the work of the commentators and the judges and has been achieved with comparatively little legislation. It offers a field of study almost as profitable to the common-lawyer as to the civilian. And in France the commentator and the legislator have been singularly aided and stimulated by critical and philosophical writers who have discussed with academic freedom the fundamental principles of law and the ways in which it might be molded to meet new needs.

A fine example may be found in the work of Professor René Demogue on "The Fundamental Notions of the Civil Law," included in this volume. It does not exactly fit into any of the "cadres" of the law library. It is not, like many of our books on general jurisprudence, an attempt to give, in a somewhat abstract way, a skeleton of the positive law, nor is it a philosophy of law in the old sense. It is rather a work of philosophy applied to the law. It is written with the eye, a very acute eye, on the object, and it contains full and excellent discussions of many difficult questions. Is the distinction between real and personal rights so fundamental as we have supposed? Can we conceive of a right inherent in a future person? What is the nature of legal personality? Does the theory of responsibility in damages require restatement? Upon these matters and a hundred more Demogue has something interesting and suggestive to say.

The writers represented in this volume do not belong to one school, but it is a happy thought to bring them here under the same roof. They approach, each in his own way and from different angles, the same fundamental problems. Has the law any ethical basis, and if so what is it? Is the law entitled to command the obedience of the citizen, and if so why? Is there any ideal law to which all positive laws ought so far as may be to approximate? If we must assume such an ideal law, is it something absolute and permanent — a sort of fixed star by which the legislator and the judge may shape his course; or is it rather an ideal which every society is continually recreating for itself — an ideal which is not the same in one country as in another and varies from age to age? Has the State as the machinery for preserving social order broken down, and, if so can any other and better machinery be substituted for it?

These are questions to which no final and complete answer can be given. They will be debated so long as the human mind retains its activity.

But the solutions which are presented in this volume by this little group of French writers are full of interest and value. M. Léon Duguit writes as a Syndicalist, though he does not belong to the revolutionary wing of the party. He thinks the modern State has proved itself a failure. It is true, to be sure, that the State in certain directions has never shown such feverish activity as in our day. There has never been such a flood of social legislation. We are bringing in socialism piecemeal, by taking over and administering public utilities, by providing for old age pensions, national insurance, workmen's compensation, and so forth. The State, in short, seems to some of us to be alive and kicking as never before. But in spite of all this, M. Duguit will have it that the State is dead, and that when it is decently

buried we must find some better way of regulating our social life and protecting our general welfare. Whether we agree with him or not, his discussion always commands our interest. There is no more brilliant or arresting writer in this field, and the reader of the present work is strongly recommended to take along with it the latest volume by the same author, "Les Transformations du Droit Public."

Interesting as are all the writings here collected, it is probably to the work of M. Fouillée that the reader will first turn. There is a sad felicity in its publication at this moment. It is a comparison of German, French, and English theories as to the basis of law and the nature and sanction of legal rights. No topic can be more full of actuality when the three great nations of Western Europe are engaged in a life and death struggle.

The dominant school of Germany teaches that the individual has no rights except such as the State chooses to give him, that the notion of there being natural rights to liberty, equality, and so on, is utterly false, and that in dealing with other States the State has the right to do whatever it has the power to do. "In the world of man," says Schopenhauer, "as in the animal world, it is force and not law which prevails. . . . Law is only the measure of power." War is necessary and, far from being an evil, is the great regenerator and purifier of the nations. The strong nation has the right to conquer and crush the weak. In the words of General Bernhardi: "In such cases might gives the right to occupy or to conquer. Might is at once the supreme right, and the dispute as to what is right is decided by the arbitrament of war. War gives a biologically just decision, since its decision rests upon the very nature of things."

Since M. Fouillée wrote in 1878, the tide of German thought has been setting more and more strongly in this

direction. Schopenhauer and Nietzsche have been brought home to the masses, and the simple and touching faith that might is right has sunk deep into the German conscience.

The immensely popular book of General von Bernhardi, "Germany and the Next War," composed with the most refreshing candor, is merely this doctrine writ large for the populace.

M. Fouillée takes as the dominant school of English thought the Utilitarians, particularly John Stuart Mill and Herbert Spencer. But the fashions of philosophy change, and if M. Fouillée had been writing in 1914 instead of in 1878, he would hardly have chosen Mill and Spencer as typical exponents of English thought. At the same time his criticism of the Utilitarians is well worth reading. M. Fouillée is not misled by the apparent cold-bloodedness of their calculations of debit and credit, and though he disputes their contention that a sound ethical basis of law can be found in the greatest happiness of the greatest number, he does full justice to their generous enthusiasm for humanity, their ardent advocacy of freedom, and their passionate devotion to peace.

The French school, according to M. Fouillée, is at the opposite pole from the German. Man as such has certain rights, the right to liberty, the right to equality of treatment, and so forth; and we must then posit an ideal justice based on the dignity of man. Social justice can be realized only in the democratic State, and if justice is impotent unless there is force to back it up, yet force without justice is tyranny, — as Pascal said long ago.

M. Fouillée holds that France has the special mission of being among the nations the apostle of liberty. The free development of the individual in a free republican State is the ideal of humanity, and it is to France more

than to any other country that the world owes this conception of progress in freedom. As for

> The good old rule, the simple plan,
> That they shall take who have the power
> And they shall keep who can,

it may be venerable, but it is not respectable, whether as a rule of conduct for States or for individuals. It is not culture but savagery.

M. Fouillée, like Ulpian, is content to accept ideal justice as an innate conception, but M. Joseph Charmont and M. Duguit attempt a further analysis of it. M. Duguit argues that law is at the bottom a creation of the human conscience, and that we must look for its sanction in the belief profoundly penetrating the mass of mankind at a particular time and place that such and such a rule is imperative. The governors no less than the governed are subject to this law; it is immanent in society. Modern society is not, as Nietzsche maintains, a mere conflict of appetites or shock of brute forces. The accidental fact that an individual or group happens for the moment to be stronger or better armed does not thereby make any quarrel just which it chooses to provoke. On the contrary, the very fact that men form part of a social group or even of humanity as a whole makes them subject to certain rules of conduct.

Enough has been said to direct attention to the interesting character of this volume, which, with all its diversity, is not without a certain unity. All of the writers who contribute to it possess in a high degree that quality, in which French writers are pre-eminent, of being able to treat of difficult matters without obscurity.

This volume contains much to interest lawyers, but its appeal is by no means limited to them.

KEY TO TITLES OF PERIODICALS

BAS ..... *Le Bulletin de l'Académie des Sciences Morales et Politiques.*

BSP ..... *Le Bulletin de la Société Française de Philosophie.*

ED ..... *L'Éveil Démocratique.*

GT ..... *La Gazette des Tribunaux.*

JR ..... *Le Journal le Radical.*

PT ..... *Le Petit Temps.*

RB ..... *La Revue Bourguignonne.*

RCL ..... *La Revue Critique de Législation.*

RDC ..... *La Revue de Droit Civil.*

RDP ..... *La Revue de Droit Public.*

RE ..... *La Revue Internationale de l'Enseignement.*

RMM ..... *La Revue de Métaphysique et de Morale.*

RP ..... *La Revue Philosophique.*

PART I

A BRIEF SURVEY OF PHILOSOPHY OF LAW IN FRANCE

(A) General Characteristics of French Legal Thought

(B) Recent Phases of French Legal Philosophy

(A) GENERAL CHARACTERISTICS OF FRENCH LEGAL THOUGHT — ALFRED FOUILLÉE

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(A) GENERAL CHARACTERISTICS OF FRENCH LEGAL THOUGHT

CHAPTER I[1]

THE PSYCHOLOGY OF PEOPLES AND THE PHILOSOPHY OF LAW

GENERAL SUBDIVISIONS OF THE SUBJECT — COMPARISON OF THE THREE LEADING DOCTRINES.

§ 1. *General Subdivisions of the Subject.* The philosophy of law, on the historical side, treats of the various conceptions of law which are found among the foremost peoples; on the philosophical side, properly speaking, it considers the various *possible* ideas of law in themselves, and determines the degree of truth peculiar to each one. From our point of view, the historical study is of secondary importance; therefore the psychology of peoples will serve only as a preliminary to our doctrine of law, or as they say in England, as an *illustration* of that doctrine, which in itself is independent of history. To give the first place in this volume to historical and psychological considerations would be to confuse what is accessory with what is essential.

We have no liking for the clean-cut and systematic classifications in which the advocates of the race theory take such satisfaction. The great nations of Europe are sisters in spirit as well as in race; no one of them can

[1] [This chapter i = introduction to Book I of *Fouillée's* "L'Idée Moderne du Droit." For this author and his works, see the Editorial Preface. — Ed.]

be confined within a *school* of philosophy, nor imprisoned in the narrow formula of an exclusive *system*. Nevertheless there exist among the nations a variety of traditions and tendencies. The history and the psychology of modern nations show us, if we are not mistaken, three great moments in the evolution of the idea of law. The first moment is a still confused synthesis of the various possible conceptions of law which we see developing almost simultaneously in all the great peoples. In England, for example, Hobbes bases law upon force and interest, Locke upon interest and liberty. The Cartesian school, represented by Spinoza, admits a theory analogous to that of Hobbes; the French philosophers of the 1700s uphold at one time the law of force, at another the law of interest, at still another that of liberty; Rousseau expressly bases law upon the equality of liberties which is realized in the social contract, understood in another sense, however, from that in which Hobbes understood it. In Germany, Kant and Fichte place law on a foundation of moral freedom and the reciprocity of social restraint; and Schiller and Goethe are animated by a similar spirit. Hegel leads the way back to the cult of historical necessity, of intellectual or even material force, of success, of victory, and of genius, and his successors go even further; but their predominant influence has not hindered the development of the doctrines of Krause and Herbart, not to mention the latest essays of Hermann, Fichte, Trendelenburg, and Ulrici, which have exerted a limited influence on Germanic thought. France, on the other hand, since the day of the Constituants, the Girondists, the Jacobins, and the school of the *rights of man*, has had in our own century her theocratic schools represented by De Maistre, De Bonald, and Lamennais, her legitimist schools, and the men to whom the name of "sentimental

clericals" has been given, that is to say, Chateaubriand, certain of the romanticists, the neo-Catholics, and others besides. Next came the Saint-Simonians, strongly imbued with a kind of historical fatalism; then the Positivists, for whom there are no *rights* properly speaking, but only *duties;* and finally, the authoritarian socialists of all sects. Even Proudhon, one of the defenders of the idea of justice, has been pleased to identify right and might from an international point of view. To-day also, we have among us more than one supporter of *historical law*, beginning with Taine. From this array of facts what conclusion shall we draw? One only is possible, — that at the outset the various aspects of law presented themselves at almost the same time to the various peoples, and in each of them to-day there still exists a medley of conflicting ideas.

§ 2. *Comparison of the Three Leading Doctrines.* It is none the less true that since the beginning of the 1800s, a kind of partition and analysis has taken the place of that synthetic confusion of doctrines. Only three ideas, more and more distinctly differentiated, now hold the field. The first two, that of major power (material or intellectual) and that of major interest, are realistic in tendency; the third, that of universal liberty, equality, and fraternity, is idealistic. Now, although these conceptions always coëxist in every civilized people (among the philosophers in particular), is there not *actually* and *provisionally*, among the leading nations to-day, an inclination to order their conduct, their legislation, and their politics according to one rather than to another of these conceptions? For the psychology of peoples and for history this is the real point at issue. But if we are not mistaken there occurred a century ago an event of capital importance, which by its intense effect on the course of history,

and by the scarcely less intense reaction which it provoked, could not fail to drive the various nations in different directions, leaving their ultimate union and reconciliation to the future. This event was the French Revolution. The English contributed to it gloriously, first by the example of their own revolutions, then by that of their political constitutions, and finally by the liberal theories of their philosophers. But in France, as was inevitable, the Revolution took on a general, humanitarian, and social character, which in the first place it could not have had in England, and which furthermore on another side was opposed to purely national considerations of race, language, and history, by which the German genius commonly seeks to justify its conquests. Unfortunately the Revolution, provoked as it was by resistance from within and from without, compromised the cause of universal rights by putting violence into its hands as a weapon. The new law proclaimed by the Revolution, and the violence of its defenders, could not fail to provoke a reaction, even in France. This reaction naturally spread to the other nations, in which the wars of the Empire kept alive a feeling of righteous defiance toward the spirit of the Revolution, as interpreted by Cæsarism. There followed two necessary consequences of this reaction. First, in France, the idealistic and the realistic theories of law existed side by side in extreme forms, but with an increasing predominance of the former, which the acceleration of the democratic, anti-feudal and leveling movement rendered inevitable among us. Secondly, in England and Germany, on the contrary, the reaction against the revolutionary movement was for the most part stronger than the movement itself, as is proved by the persistence in these countries of an aristocratic and partly feudal régime, and the realistic theory has therefore ended in prevailing over

the idealistic there, in our own day. But that is not all. The realistic doctrine being itself susceptible of two interpretations, England has manifested an instinctive preference for one and Germany for the other — a fact which may be explained by the difference in their social and political organization. The English system is *industrialism*, as described by Spencer in his "Sociology"; the German system is what the same writer designates as *militarism*. To the English, who attained to civilization later than France and the Latin peoples, France once on a time sent over her Normans; but she could not induce the English to accept the Roman law with its abstract generalities, nor Catholicism with its spirit of authority. Moreover, thanks to her geographical position, England was the first nation of Europe (after Holland) in which the military spirit gave way to the spirit of commerce and industry. The mass of the German people, attaining civilization still later, and unity not until our own day, have necessarily retained a certain quality of crudeness, discernible even in their science and their philosophy; "altruistic" instincts are newer to them than to France or England, and the military system has been further developed there than in any other country. Now, the idea to which industrialism leads is explicitly that of *interest;* the idea upon which militarism rests, at least implicitly, is rather that of *power*. What, then, was the one way logically open, fifty years ago, to an *industrial* but still feudal nation in a state of reaction against the theoretical or practical excesses of ideal rights, that is to say, of pure, abstract rights? It was "utilitarianism," properly so-called. And what way was open, some years ago, to a *military* and feudal nation in a state of reaction against the same excesses? It was that of preoccupation with material and intellectual power,

and of more or less professed respect for it. Thus the present divergence of the tendencies among jurists, politicians, publicists, and philosophers in vogue in the various countries, was historically and logically inevitable. This difference is only provisional, however; and we can already foresee the time when equilibrium will be established, in the mind of each nation, between ideas of power, interest, and freedom. It is none the less useful, in order that we may appreciate the value of these various elements of the same idea, to trace its at once historical and logical development in the principal modern nations. Later we shall try to show how the realistic and the idealistic conceptions may be reconciled in one synthetic doctrine.

CHAPTER II *

THE FRENCH SPIRIT AND THE IDEA OF LAW

NATIONAL QUALIFICATIONS FOR SPECIAL SERVICE — THE FRENCH CHARACTER — THE TRADITIONAL IDEAL OF FRANCE — "ENTHUSIASM" AS A NATIONAL TRAIT — THE RATIONAL GOAL OF THE FRENCH WILL — MEANS OF ACTION — CONTAGIOUS INFLUENCE OF THE FRENCH SPIRIT — A NEW TYPE OF PROSELYTISM — THE FRENCH WILL IN ACTION — THE INVINCIBLE OPTIMISM OF THE FRENCH — FRENCH POLITICS ARE NOT UTILITARIAN — THE GENIUS OF OUR LANGUAGE — FATALISM NOT ACCEPTABLE TO THE FRENCH — GOOD AND BAD EFFECTS OF THE DOCTRINE OF PROGRESS — NATIONAL TRAITS REVEALED BY THE RELIGION OF THE FRENCH — LIBERTY THE PRIMARY BASIS OF LAW — LIBERTY AND EQUALITY ARE INSEPARABLE — SPIRIT OF EQUALITY PECULIAR TO THE FRENCH — MANIFESTATIONS OF THE SPIRIT OF EQUALITY — EQUALITY MUST STAND SECOND TO LIBERTY — POSSIBLE MISAPPLICATIONS OF THE IDEA OF EQUALITY — DEFECTS OF THE NATIONAL CHARACTER — MEANS OF REMEDYING OUR DEFECTS.

§ 3. *National Qualifications for Special Service.* If in the past the French were too prone to overrate themselves, they are to-day perhaps too much inclined to self-depreciation. Let us try to reëstablish a proper consciousness of our own worth, guarding, however,

* [This chapter = chapter v, Book I, of *Fouillée's* "L'Idée Moderne du Droit"; the preceding chapters, omitted in this translation, deal with legal philosophy in Germany and in England, already fully covered in other volumes of this Series. — ED.]

against the excesses of a national fatuity which would be now less justifiable than ever. Not long ago most of the historians and philosophers, those of England and Germany as well as those of France, gave first place, in this country of revolution and universal suffrage, to the ambition which would regenerate the civil and political order by basing it upon pure justice; most of them granted to France a sort of historical vocation for the establishment of a reign of law based on human rights. One of the greatest opponents of the "rights of man," one of the writers most hostile to our glory and our revolutionary ideas, Joseph de Maistre, nevertheless recognized that France "for a long time exerted over the nations a peculiar kind of influence," which, bearing specially upon problems of law, upon political and social questions, might well be called "a true magistracy." A well-known German historian, one of those who have not spared our country in these later years, formerly represented France as "having received the mission of revising, from time to time, the great laws of European life and the institutions of civil and political right which in the beginning it had helped to establish on every side." If this traditional mission formerly accorded to France could have been accomplished to the end, it would have raised France to the position of lawgiver for the modern nations, tirelessly seeking a truer expression of justice. Our ambition does not go so far as this, but it is unquestionably true that the part we have taken as apostles of ideal law has been the most characteristic thing in our history up to the present time, and indeed, for the past hundred years, in our philosophy also. If those great metaphysical systems of the universe for which such men as Diderot, Alembert, and Holbach had already risen in France, have been developed more especially by Germany in this century, and by

England in quite recent times, the great social conceptions, on the other hand — in our opinion even more useful in making the true meaning of the universe itself comprehensible [1] — have sprung up in our country with an exuberant fecundity. What a blossoming forth of ideas and theories there has been in France in the last hundred years, concerning the basis of law and all its applications, — social, political, and religious renovation, the right of property, the right of husband and wife in the family, the right of the citizen in the State, — theories now profound, now strange, now monstrous, since the human mind, like nature, cannot be really fecund without sometimes bringing forth monstrosities! In art, would romanticism have inspired everything with new life if its bold spirit had not mingled some extravagance with the truth; and need we marvel that social science in our country has also had its touch of romanticism? Doubtless, just as France has held the highest honors in this kind of research, it has also stood in the greatest peril, that of seeing original theories degenerate into Utopias, and Utopias into violences; but the thinker should overlook the practical inconveniences from which the present generation must still suffer, when he considers the speculative services rendered by our country to all humanity. The suffering which is borne with courage and rewarded by results is more honorable, after all, than egoistic repose. For nations, even more than for individuals, to think and to strive is to suffer: "Quæsivit lucem, ingemuitque."

§ 4. *The French Character.* Let us first recall in a few words the well-known causes which have contributed to the formation of our character, with its qualities and defects that need equally to be understood; let us consider climate, temperament, and especially race

[1] See the conclusion of our "Science Sociale Contemporaine."

and historical tradition. The geographical situation of France, midway between the north and the south, where all varieties of climate and of vegetation unite their principal products, from the pine to the orange, is congenial to the development of a spirit that shall not be narrowly national and exclusive, but accessible to widely varied and general influences. To this type of mind add a temperament likewise midway between the extremes, rather nervous and sanguine than lymphatic and bilious, in which the seriousness of the north is offset by the vivacity and the passion of those lands of sunshine where human qualities exhibit a more harmonious equilibrium: an equable temperament, one might say, which tends to unite the various human faculties in equal proportion, and to give due emphasis to each, according to a kind of natural justice; a character at the same time intense and moderate, not easily permitting any single passion, caprice, or eccentricity to clash with the general reason; which would require in all things conformity, propriety, and elegance, and which, although eager for novelty, strives nevertheless to hold steadfastly to "common sense" and "good taste." "The Frenchman has a dominating predilection for moral beauty," wrote Kant in 1764. "He is gracious, polished, and considerate. He bestows his confidence readily. . . . The phrase 'a well-bred man or woman' can properly be applied only to one who possesses the instinct of French politeness. Even the exalted emotions, numerous as they are, are subordinate in the French to a feeling for the beautiful, and derive their power only from their accord with the latter feeling." We carry even to *excess* our aversion for the *excessive.* Our effort to be moderate results in a loss of force; our endeavor to be clear in a loss of depth; in striving too greatly towards the beautiful, properly so-called, and

towards proportion, we diminish our sense of the sublime, the infinite, and the incommensurable. But if we have not always as great depth of thought as the Germans or the English, it sometimes seems that we have greater breadth. A broader, and in some sort, a more humane mind is what the two prime influences which we have spoken of have tended to develop in our country; but if we wish to have a more exact notion of our national physiognomy, we must recall the native faculties of our race, so often pointed out by the historians. When our neighbors from beyond the Rhine go back so readily to India and even farther for the origins of their "Germanic mission," we may perhaps be permitted to go back as far as the Gauls, in whom we discover an instinct of justice, a kind of juridical faculty, by which even antiquity was impressed. Who is there who does not know Strabo's portrait of the Gallic race, in which, even thus early, it is stated that our ancestors readily espoused the cause of those who were suffering injustice, τοῖς ἀδικεῖσθαι δοκοῦσι? According to Cæsar, the Gauls took care not to confuse the right and the law, "jus et leges"; and Strabo tells us that the Druids were already laying great stress, in their teaching, upon the right and the law, "first teaching their pupils concerning natural right, and then concerning constitutions and the particular laws of States."[2]

[2] We have also remarked frequently that instinct of brotherhood which made our ancestors look upon self-sacrifice as a supreme distinction. Even then they gave the name of brotherhood, "brodeurde," to the associations in which young warriors, attaching themselves to some renowned knight, vowed an absolute devotion to his person through life and death, "mounting the funeral pyre," so Polybius and Cæsar tell us, "beside him who had held them dear." To that instinct of brotherhood was finally joined a certain sentiment of equality which at times annihilated the distance between classes and between sexes, which permitted slave or woman to enter the college of Druids by free adoption, allowed the daughter a free choice of husband, the wife personal freedom, property, and a share in the administration of common goods — the first suggestion of the family as our law has established

§ 5. *The Traditional Ideal of France.* We have only to recall our actual historical tradition to recognize that when Gaul became France, it remained faithful in a general way, through good and bad qualities alike, to the hereditary genius of its race. History is a kind of biography of nations which serves merely to trace their psychological type through the ages, as a personal biography reveals in action the character of an individual. We have been a civilized nation longer than our neighbors, Germany and England — a condition which has its advantages and its disadvantages. It was still very early when Gaul embraced Christianity, the doctrine of justice and fraternity. Later, if chivalry received its greatest development in France, enveloping it with all its glory, it was because knighthood, devoting itself wholly to the service of those unable to defend their own rights, to the poor, the orphans, the women, personified with high courage a tradition of generosity and of devotion to justice. If the sovereigns of France more than all others, in the midst of universal despotism, professed to be the "refuge of the oppressed," and the "supreme justiciaries,"[3] it was doubtless because, in the eyes of the French people, the noblest use of power seemed to be the protection of the rights of the weak. If it was in France that the noble madness of the Crusades had its beginning, preached first to the people by a man

it in France. These sentiments of equality sprang from an already keen love of liberty, added to a still vague conception of the inherent value of the human personality. One manifestation of this conception was the firmness of the Gallic faith in a personal immortality. The Gauls believed that persons and personal attachments were of such inestimable value that they must survive even death itself; death is only "a midway stage in a long life." The ancients, as we know, kept going back incessantly to the strength and importance of this belief, which in practice inspired an indomitable courage and contempt of death: "Non paventi funera Galliæ."

[3] See, in *Taine's* "Ancien Régime," the chapter in which he explains seignioral and royal privileges, pp. 14ff.

of the people, then winning lords and kings, thereafter to draw all Europe in its train, it was because here again it was a question of giving aid to their brothers who had been wronged in their faith, in their liberty, and in their rights. If France herself, when threatened by the English, saw rise up from her midst not only heroes, such as all peoples have, but heroines, whose sweet, strong faces are unmatched in the history of other nations, it is because in the land of Jeanne d'Arc, as in ancient Gaul, the traditional honor of consecrating oneself to the cause of justice was no more denied to woman than to man, and no one was refused the supreme joy of heroism sacrificing itself to the right.[4] Finally, in our own century, history, dwelling on less remote examples, portrays us as a nation which has resented the injustices which other nations have suffered, as much as, sometimes even more than, those which it has suffered itself, — a land where the multitude, sadly wanting in foresight, was much less ardent in looking to its own affairs than to the rights of Poland, Greece, Ireland, and Venice, in their times of oppression. The other nations are well aware of this, and it must be acknowledged that when they have been in need of active sympathy or disinterested help, they have not turned by preference to England or to Germany, but to the country which first proclaimed not only the rights of man, but the rights of nations, and which is always more than ready to judge

[4] "If any thought were given to the encouragement of the national spirit," remarked *Kant*, "women in France might have a more powerful influence than anywhere else over the actions of men, if they would but urge them on to noble deeds. It is a misfortune that the lilies do not spin." ("Des Caractères Nationaux," p. 305.) — Jeanne d'Arc, it is true, did better than to "spin." But it is certain that the Frenchwoman should have an education more worthy of her influence. To quote from *Kant* again, "The object to which the national merits and virtues of the French are especially related, is woman." And he added: "I would not have said, for all the wealth in the world, what Rousseau dared to maintain, that a woman is never anything but a grown-up child."

others by itself. This preoccupation with justice for all is a tradition of France, which she has often carried to an unfortunate forgetfulness of herself and of her own legitimate interests. Our history, intermediary between the Græco-Roman and the Anglo-Germanic, the only history interwoven with that of all the great nations, the only history perhaps which thus forms a perfect, unified whole, is especially characterized by the preponderant part which it has taken in the development of modern humanity, in the progressive initiation of other peoples into a new conception of law. Germany's ideal was above all — at least in the beginning — religious and metaphysical; England's was especially political and economical; the ideal of France is essentially social and humanitarian.

§ 6. *"Enthusiasm" as a National Trait.* Let us now pass from the causes which influenced the formation of our national character to the psychological analysis of this character itself. We shall see that our most important faculties, like those of other nations, can be deduced one from another, and that they form a system analogous to an organism.

In nations as in individuals, the thing which especially determines character is the faculty which controls conduct, namely, the will. If we would appreciate the will of a people at its just value, we must examine successively three things: its degree of force, its habitual object, and its means of action. Now, to consider first the living force of the will apart from its object, the psychologist finds the English people exhibiting a greater tenacity and patience, the Germans a more rugged energy, the French more spontaneity and impulsiveness. Enthusiasm has been included among the traits characteristic of the French by all observers, and enthusiasm is only the spontaneous impulse of the will towards an ideal by

which it is strongly stirred. In France it is the social ideal, above all else, which has stirred us. "France is the land of enthusiasm," said Kant in his work on the characteristics of the various nations. Madame de Staël finished her "Germany" with the well-known apostrophe: "O France, if the day should ever come when enthusiasm shall be extinct upon your soil——," an apostrophe which the imperial censorship hastened to suppress, as if despotism understood that enthusiasm for what is best is indeed the primary liberty for a nation's soul, and the fruitful germ of all other liberties. John Stuart Mill, in his "Memoirs," also mentions enthusiasm as one of the qualities distinguishing the elevated French genius from the sometimes too servile commonplaceness of English or American Positivism.[5] Enthusiasm in a nation manifests a certain freedom from lower preoccupations and material concerns, and in consequence a certain moral freedom of mind. This should not be confused with that mere ardor of passion, that hot-bloodedness, which some of the southern races exhibit in their pursuit of what they covet, not discriminating between what is gross and inferior and what is superior and noble. France, too, has had her hours of blind and odious passion, but quite different is enthusiasm properly so-called, of which she has more than once given example, and to which she has owed sometimes such wise reforms, sometimes such sorry deceptions. Doubtless one feels in enthusiasm an emotion of the heart as well as an impulse of the will, but what rouses the will and stirs the heart is thought; it is the mind's conception of the beautiful or the just that gives birth to true enthusiasm, — an intellectual flame, shedding light on its own path and

[5] *Heinrich Heine*, rightly regarding Paris as the very heart of France, greeted her as "the city of equality, of enthusiasm, and of martyrdom, the city of redemption, which has already suffered so greatly for the temporal deliverance of mankind." ("La France.")

the paths of others, because it is idea and passion in one.

§ 7. *The Rational Goal of the French Will.* If we are to estimate the will of a people at its true value, we must not confine ourselves to a consideration of the will in itself or of its degree of energy; we must examine especially the object which it habitually has in view. From this second standpoint the French nation exhibits a truly distinctive character. In the golden hours of the history of France, the object of the national will has been confounded with the object of reason itself, for it is on behalf of general and universal ideas that it has been most passionately aroused. In our country, we do not want merely the liberty and the rights of Frenchmen, but "rights of man"; our reason always tends to generalize the object towards which our will is directed. Hence the characteristic feature of our national physiognomy is the union of these two things which at first glance are so opposed: the spirit of enthusiasm and the spirit of rationalism. Cavour said that the French genius was logic in the service of passion. It would perhaps be truer to say that it is passion in the service of logic; Cavour was indicating only the defect of our quality and the excess to which it may be carried. But equally often we offend by an excess of abstract logic. Have we not often been reproached, on the part of the English, with a taste and a mania for generalizing! The idea of utility and the idea of power, which the empiricism of certain peoples takes up most readily, have none of this universal character; but the French genius, rightly or wrongly, always conceives of justice as an idea of infinite scope. Whatever may be the excesses of this tendency, it must be acknowledged at least that a will which possesses the quality of generality will also possess that of generosity. This it is that necessarily explains the

existence among the French of that faculty of disinterestedness, carried to the point of Utopia, which has impressed all historians, all psychologists. John Stuart Mill saw in that faculty the chief nobility of our character; Spencer, more faithful than Mill to Bentham, found in it a cause for reproach; the same quality led Fichte to hold us up as an example to his compatriots. More recent writers who have treated of the "psychology of peoples," Gneist and Lazarus, find in us the same tendency to detach ourselves from our own interests in the furtherance of a universal conception, sometimes that of a *rational being*. Such a tendency has contributed not a little in these later centuries to the development of that "classical spirit" towards which Taine has evinced such severity, and in which he finds one of the principal explanations of the French Revolution. We must guard against carrying Taine's thought too far, true though it may be in itself, and also against seeing in the revolutionary impulse only a classical taste for generality, for abstraction, and for rational symmetry; classical habits of mind would scarcely account for such a social upheaval. Moreover, this love of anything which is general and applicable to all humanity seems to have itself had for its principle, in the eighteenth century, keen intuition and rational love of liberty. Indeed it is irrational to love liberty for one's own sake, since in a society in which all the members are solidary, one cannot have true, complete, and absolute liberty if the others do not have it, if they are not in this respect one's *equals*. Suppose, for example, that a single nation of the globe should adopt and practise all the rules which insure freedom of labor, of exchange, and of association; if these rules do not exist for other nations, will not economic combinations finally arise of a nature to prevent the desired result and to militate against freedom

itself? The relations existing among the citizens in each nation imply a similar solidarity; there cannot be freedom of capital, for example, without freedom of labor, and vice versa. In our century, in a word, the philosopher and the economist with a general outlook find the independence of one part of humanity bound up in the end with that of the rest. Why hold it against France that she has had a spontaneous understanding of that universality which ought to belong more and more to liberty? Why reproach France with having perceived that from the point of view of the philosopher, the rights of the Frenchman cannot exist without the rights of man in general? We ought to love liberty for the sake of others, as well as for its own sake. It is thus that it acquires, like reason, a universal bearing; it is thus that it becomes *equality*.

§ 8. *Means of Action.* A concern for general and disinterested ideas, and a freedom from narrow, personal views, were the most striking characteristics, taking all the facts together, of that Revolution in which the genius of France discovered its own being, and the effect of which is to-day the object of systematic efforts of detraction. This concern is what made possible that night of liberality, the fourth of August, when all the groups within the nation, the third estate, the clergy, the nobility, voluntarily renounced their privileges in the name of Law, acting under the influence of an enthusiasm for liberty so powerful that the egoism of any individual member of the assembly was lost in the general disinterestedness. De Sybel himself, unjust though he was as historian of the French Revolution, could not help giving homage to that act of renunciation on the part of an assembly into which, veritably, the spirit of the nation as a whole had been breathed. "It was for all time," he said, "that the French assembly,

on the night of August the fourth, won freedom of labor and equality of rights."[6] Renan, who also exhibits a certain partiality for the Germanic spirit, says in comparing Germany and France, "Germany does not *do* anything disinterested for the rest of the world.[7] . . . The rights of man are surely something, too; these were established by our eighteenth century and our Revolution."[8] Janet, in his "Philosophie de la Révolution Française," is right in saying that "the Protestant revolutions were more local than otherwise; only that of America was of a more general and abstract character. It was concerned with the same causes as the French Revolution, and, like the latter, received the impress of the spirit of the eighteenth century. The two should not be separated, inasmuch as France had so large a share in the success of the American Revolution."

Despite the resemblances between the American spirit and the French spirit, we believe that the two revolutions manifested differences which are even more profound. What relation the matter of taxes and the tea episode bore to the revolt of the United States is well known. And what contrasting methods of procedure did the two peoples exhibit when in formulating their constitutions they came to setting forth the rights of citizens! The American method was to go from state to state in quest of the principles which each on its own account acknowledged in advance. These were summed up and generalized as much as possible; and finally the whole formula which the federation was to accept was drawn up a posteriori, with equality, a mere consequence,

[6] "Histoire de l'Europe pendant la Révolution Française," translated by Mlle. Bosquet.

[7] The real glory of Germany, in our view, is rather that she *thinks* of disinterested things in the philosophical, and especially in the metaphysical, domain.

[8] "La Réforme Intellectuelle," preface, Paris, 1872.

placed rather awkwardly before liberty. It is too soon to judge whether or not that is the best method; but it is true beyond question that the Americans were, and still are, filled with the empirical, practical spirit of the English, which in general thinks more about itself than about humanity. The English draw up, not declarations of rights, but what they call "petitions."[9] In England, when the laborers themselves are demanding reforms, they confine ordinarily their exertions to their own interests or those of their comrades, their workshop, or their city, and seldom think of generalizing or of demanding reforms of principle. So the questions have for them only a local bearing, while for the French laborer they become not only social questions, but actually, with increasing generality and distressing precipitation, *the social question* itself. Neither have the Germans, in their attempts at independence, displayed such disinterestedness of will, or enthusiasm of reason, as that which, in spite of its numerous illusions, secured to the France of the 1700s such high rank in the opinion of thinkers. "In the midst of the philosophy and the poetry of Germany, the people remained immured in density of thought, and if they sometimes clashed with the authorities, the question was always one of the most sordid realities, material discomforts, oppressive taxes, customs, tolls, fines for poaching, etc., etc.; in practical France, on the other hand, the people, inspired and guided by the writers, strove more often in the cause

[9] There is some truth in *Heine's* sally: "It is in the narrowest corporation spirit that the English demand their liberty, that is, their liberties secured by charters and franchises. French liberty, the liberty made for human kind, the liberty which the whole universe will one day possess, with reason for a title, is essentially and inherently odious to the English. They understand none but English liberty, Anglo-historic liberty, patented for the use of his subjects by His Majesty the King of Great Britain, and based on some ancient law, perhaps of the time of Queen Anne." ("La France," p. 205.)

of intellectual interests, of philosophical ideas." Putting all exaggeration aside, the fact that the testimony from these varied sources leads to the same conclusion seems to justify in large measure the words which Michelet addressed in high-minded pride to the detractors of our fatherland and our Revolution, and which might well be addressed to them again to-day: "If we should bring together all that each nation has expended in blood, in wealth, and in every kind of effort on behalf of those unselfish things which are profitable only to the world at large, France's pyramid would rise to the very sky; and the accumulation of your sacrifices, O nations, great as you are, would no more than reach the knee of a child." [10]

War itself, the delight of our ancestors of Gaul, has never been truly *popular* in France except as it has been ennobled by some disinterested idea to be supported, some great cause to be defended — honor, liberty, or right. We do not mean to say that all of our wars have been good and just; far from it. But they have been sincerely *popular* only when they have involved, rightly or wrongly, some *general* consideration. It was an able despot who made the significant remark that "France is the only country that makes war for the sake of an idea," and our rulers understood this so well that they always concealed the ambitious character of their military policies beneath some idea of devotion to common freedom, of emancipation of peoples, of succor for oppressed nations. They knew that the real "soul of the people" would not long be with them if they did not lure it along in the name of a general idea.

§ 9. *Contagious Influence of the French Spirit.* This habit of disinterestedness in the popular will, itself produced by the generality of its object, in its turn makes

[10] "Le Peuple," p. 71.

clear to the eyes of the psychologist the somewhat contagious character of our national spirit, its power to spread rapidly from nation to nation. It has lately been observed that the very *universality* of our desires shows that we desire not only for ourselves, but also for all others, and thus desire equality. We have fallen heir, moreover, to a portion of that Stoic, that Roman genius, which was perpetually translating itself into legislation. We like to make legislators of ourselves, especially in the interest of humanity, quite as if we were already members of the "universal republic," or as if Kant's celebrated formula for duty and law, inspired by Rousseau, were the translation into abstract form of the procedure most familiar to the French: *So act that the rule of your action may be a law for every reasonable free being, as if you were at once both citizen and law-maker in the society of human kind.* There is scarcely any need for remarking how mistaken and dangerous this procedure may be from a practical point of view, what a risk one runs of going too fast and pitching headlong into inapplicable generalities. It is none the less true that the *rational, universal* will has naturally an expansive, sympathetic power by which other wills are swept along. The necessary consequence of this psychological law is that in desiring for others, we have often led others to desire as we do. Foreign nations, recognizing the impersonality of our views and their value to them as well as to us, naturally felt that in political and social questions the affairs of France were the affairs of all the world. Hence the development, the successes, and the excesses of our proselytism, which is at the same time enthusiastic and rational, although sometimes irrational; which cannot be persuaded to limit either the scope or the application of its truths; which in all things requires harmony between principles and results, and

the frequently chimerical extension of these results to all the earth; and which, finally, does not expect to find satisfaction or repose or the fulfillment of its desires except in the accord of every mind with all other minds, of every nation with all other nations; in a word, in that universal brotherhood from which we are still so far distant.

§ 10. *A New Type of Proselytism.* Joseph de Maistre, the ardent partisan of the old régime, despaired of this essentially democratic influence, all the more invasive by reason of the readiness of others to accept it. "Two peculiar traits distinguish you from all the other peoples in the world," he said to the French of his own time, "the spirit of association and the spirit of proselytism." He applied to us that prophetic saying: "Every word from this nation works a spell"; and again he commented on the inability of the French to live *isolated.* "If you would restrict your activities to yourselves, you would at least be left in peace; but the propensity, the necessity, the mania, for extending them to others is the most salient trait of your character. One might say that you are the very embodiment of this trait. Each nation has a mission; this is yours. The least opinion which you give to the world is a battering-ram driven by thirty millions of men, — a mysterious force, inadequately explained up to the present, and as potent for good as for evil." If Joseph de Maistre was unable to explain this force, it was because he saw in it, primarily, energy of passion rather than a more or less well ordered, simultaneous development of liberty and reason — two faculties which are in the most perfect accord, since they are the most human. Nor did he bring out the new and characteristic feature of French proselytism which might have been deduced naturally from the predominating faculties of the nation. While it was religion alone which

elsewhere throughout the world had awakened the spirit of propaganda, in France it was the idea of rights which aroused it. It was a question of disseminating not only beliefs which transcended reason, but also truths derived from reason. For religious apostleship France substituted social proselytism, or to put it more exactly, republican proselytism.

What has added to the influence of the French upon other nations is the facility (through which it often comes to grief) with which this nation shakes off international hatreds, overlooks traditional grievances, and protects sons from the wrath inspired by their fathers. It is temperamentally and intellectually hostile to the idea of reversibility, of solidarity between widely separated generations; it repels this idea in the name of humanity as well as in the name of law; it sanctions with difficulty the doctrine of original sin, and the maledictions and national grudges which are passed down to the twentieth generation. The Germans, for their part, still reproach us for what they endured from us in the time of Louis XIV or even in the Middle Ages; they extend their imprecations to the entire race, which they readily personify for the purpose of cursing, of hating, of exterminating it. Heinrich Heine predicted as much. "A day will come when you will be reproached for the slaying of Conrad by the Duke of Anjou, and his death will be avenged." The Frenchman does not understand these erudite quarrels. Preoccupied especially with individuals, he does not naturally ascribe their faults to nations and races; he is ready to sympathize candidly with sons of former enemies, however unready they themselves may seem to discard old animosities. He can scarcely comprehend how any one, using science and history as a pretext, should wish to substitute a popular tradition or a race rivalry for human rights; he

insists upon individual responsibility as a consequence of freedom. He prefers to retaliate by leading others to desire what he desires — a chimera, perhaps, but a noble one, after all.

§ 11. *The French Will in Action.* To have an ardent desire, or to strive towards a lofty, universal object, is unquestionably not enough; one must also have the power to act. This is the third point of view from which we must consider our national characteristics if we would estimate them exactly. We must judge by what they accomplish both in the invention of method and in practical application. The intensest desires do not always bring the best results; we have far too often exemplified the truth of this by our errors and our failures. Yet, in this same field of application and actuality, can it be denied that the French have exhibited at times a will as efficacious in action as enthusiastic in its inspiration? Our ideas of right, after all, have actually passed into our codes, and thence into the codes of modern nations; even the English gave our civil code to the island of Ceylon, and the Italians took theirs from us entire. So it must be conceded that the French people have not only been generous theorists, but have also had, after a manner of their own, a certain practical genius. However, in the application of their theories they have differed from their neighbors, and have too often shown the defects of their qualities. The English and the Germans, instead of asking for all possible liberties at once, wisely ask for a first, which shall be the means of obtaining a second; they wish above all to possess a series of means, a combination of forces and interests; they fix their aspirations particularly upon the successive links of this chain, and patiently secure them one after the other. The liberty which can be separated into fragments does not exist for the French

people; they impatiently demand it in its entirety. Less concerned with the means than with the end and the idea which they wish to realize, they rush along to that end with an impulsiveness too often blind, and thereby overlook many intermediary considerations. They would like to possess at once the last link of the chain, without stopping to think whether it might not later be spirited away from them by the hands which hold the intermediary links. While the Englishman and the German emphasize the importance of success, the Frenchman lays particular stress on desire. He imagines, to his own detriment, that desire is power, that "for the French, there is nothing impossible," and that seeking is finding; he does not understand why any limit should be set to the freedom or the intelligence of man."[11]

This accounts for the attitude which his will assumes in the face of events; it is not aware of the obstacles which are set in its way, or if it does perceive them, it disdains them and passes by on the other side. What is more, the obstacle even possesses an attraction for it, as if it found opportunity therein for a triumphant manifestation of human freedom. It does not recoil even from death, the supreme obstacle, believing itself imbued, despite appearances, with invincible and immortal strength. Few races in history have looked upon death with a more smiling countenance, or yielded up the gift of life with less of regret.

[11] *Kant* — in his acute observations on the characters of peoples, written, let us note, in 1764 — made one memorable mistake which shows that the history of nations contains many surprises for the *psychology of peoples*. "The Frenchman," he wrote, "is a *peaceful citizen*, who when oppressed by the farmers-general, takes revenge by satires or by parliamentary remonstrances; and when the fathers of the people have satisfied popular desire by a fine show of patriotism, all comes to an end in a glorious exile and songs in their praise." *And all ends in song*, while waiting for 1793.

§ 12. *The Invincible Optimism of the French.* In the case of possible victory, when only courageous effort is required, who has a better chance to win than he who has no fear of danger? We need look no further for an explanation of those inspired successes which enabled an entire nation, with one impulse, to reach the desired goal. We may explain similarly those failures due to inexperience and the want of foresight, and also, which is a graver matter, those boastings which have exposed us to the charge of levity and ostentation, and finally, that profound but not prolonged discouragement which follows our moments of high courage. We might liken ourselves to a traveler who, scaling a mountain by the most perilous path, his eye fixed upon the summit, casting no look behind him, suddenly faces an insurmountable obstacle. He stops, turns his head, is seized with giddiness, and lets himself be led down. But he consoles himself with the thought that some day, by another path, he will yet gain the summit. The Frenchman even reaches the point of belittling immediate success and present utility; his reason temporarily renounces the attainment of material results, provided the truth of "principles" be acknowledged. This is why the French people want, at the beginning of every political constitution, a declaration of rights, hollow though it frequently may be, which apparently satisfies first of all their reason, or, as they say, "human reason." If shrewd politicians afterwards corruptly apply these rights, and find means of so perverting the practical applications that the principles are set at naught, — if, after proclaiming liberty, they confiscate it, — we in France, at any rate, would rather see the idea of right recognized and our own right disregarded; others, we say, will profit by the truths which the very ones who violated them will be forced to proclaim to the world.

Thus do we argue, always too ready to ignore ourselves and to let ourselves be imposed upon. Napoleon I understood this trait when he wrote to Fouché: "Suppress all the newspapers, but put six pages of liberal reflections concerning principles at the beginning of the decree." The Frenchman has a speculative mind; he would have the light visible to all even though he himself were immured in darkness. He says to himself, "The sun will rise, and the light will shine for all at last." Moreover, if the French people have neglected their liberty in practice, it is really because they have always believed themselves certain to get it back again. If they have made the egregious mistake of letting themselves be fettered, it has been because of faith in their power to will the fetters off again. If they have enthusiastically prostrated themselves before a man, and, for the time being, sacrificed their liberty to him, they have acted under the promise that this would be given back to them, or with the mad and perilous mental reservation that a revolution would suffice to deliver them from the yoke of despotism. In France they do not admit that an iniquitous régime can be maintained, and they constantly repeat, "That cannot last," as if history did not continually belie such optimism. This shows a naïve and invincible confidence not only in the final triumph of justice, but also in the general spirit of the nation; each individual feels that he can accomplish nothing alone, but believes himself to be a part of a society which sooner or later will triumph. This social instinct, this consciousness that we and our compatriots hold ideas in common, is what gives us in duress a temporary resignation by keeping alive a perpetual hope.

§ 13. *French Politics are Not Utilitarian.* The other nations, much more prudent and practical, therefore

accuse us, not without reason, of levity and thoughtlessness. Yet they do not always understand what fixity of ideas may be concealed at times underneath our seeming mobility. The Celtic race is obstinate; look at our Bretons. In point of ideals, England and Germany, each in its own way, readily content themselves with a partial fulfillment; anything substantial, even though limited and incomplete, satisfies them, and they renounce all else. They want good legal guaranties for their present interests, a good system of defense or attack for their personal service. They make few gifts to others, and seldom lend except on mortgage. This has its advantages, but it may also have its dangers. If the nobility and the grandeur of the end frequently make the French oblivious to the difficulty of the means, the other nations, on the contrary, seeing more or less well calculated means on every hand, would be led in the end to renounce the lofty and far-distant goal. Furthermore, they would at last come to see in men themselves only means and instruments, elements of calculation, figures of interest, units of force. The distance from this to the use of men at need, as one uses things, is not great. On the other hand, nothing is more antipathetic to the spirit of the French, which opposes to purely utilitarian politics and the traditional Machiavelism the idea of human inviolability and of "human rights." The French are by no means strangers to violence, especially in times of revolution; but it is then the result of extreme excitement. They never resort to it in cold blood, organizing it according to the rules of science, with a preconceived design, as the Romans did. Moreover, the French as a race, in their customary modes of action, know little of deceit; justice and the right are invoked. Has France ever been given, even in jealousy, the name of "perfidious France?"

We have often been accused, and rightly so, of passion, of madness, of desperate acts, but seldom of disloyalty. Bad faith requires combination, precaution, secrecy, and delay, for which the French are poorly fitted; this is not their vocation.

§ 14. *The Genius of Our Language.* Even our language is excessively frank and rectilinear, like our national spirit, — for the language of a people is to the national character what the facial features are to the character of an individual. Philology is a physiognomy. "The other languages," said Rivarol, "would have been fitted, by their obscurity, to the rendering of oracles; ours would have robbed them of their mystery." It is laws and not oracles that our language is best fitted to express, laws of science and laws of men. Our language is neither the most metaphysical nor the most poetical, but it is the most scientific and the most juridical. For the expression of the most general ideas and the most generous passions, it is incomparable.

§ 15. *Fatalism Not Acceptable to the French.* The pre-eminence in the French mind of the universal idea over particular facts, of the final end to be attained over the immediate means, accounts for the idealistic and rationalistic tendencies of the French, extremely evident in our legal systems and constitutions. This political idealism is in contrast with the more naturalistic and historical spirit of some nations; for the concatenation of the facts of experience is really nature. Moreover, as this concatenation has a character of necessity, as causes and effects, means and ends, form a mechanism governed by mathematical laws, the nations which recognize this mechanism everywhere are predisposed to fatalism. On the other hand, fatalism has no place in the French character. Neither the dogmas of

Luther and Calvin, nor the foreign metaphysics by which the human will is completely absorbed into the great whole, have become acclimated among our people, who believe in freedom more than in destiny (even in the inexact form of free will), and more in law than in grace.

The effect of metaphysical or religious fatalism on the will of a people, in all political and social practices and reforms, is to moderate impatient desire for progress, sometimes even to destroy the idea of it, as it tends to do in Germany, where, since Schopenhauer and Hartmann, a dejected pessimism has seemed to triumph. Quite opposite is the effect of the doctrine which teaches, in one or another fashion (perhaps metaphysically superficial), that there is some power of freedom inherent in man; for freedom is at bottom nothing more than unlimited perfectibility. It is worthy of remark that France is the country where the doctrine of progress was developed by Pascal, Turgot, Condorcet, Auguste Comte, and their successors, and that this is the doctrine which has contributed to the reconstruction of law. Here is another trait of our nationality, characteristic to the psychologist as well as to the historian. The French genius had only to become conscious of its aspirations in order to conceive the idea of perfectibility, one of its most essential tendencies. With the impulsive and sometimes bungling spirit of the innovator, with a will always seeking what is best and impatient to attain it, its eyes are on the future rather than the past or even the present. Nor is it willing, in its legislation and its politics, to become the slave of either history or tradition; it does not even comprehend those expressions so easily understood beyond the Rhine and across the Channel, "historical rights," "traditional rights." The distinguishing trait of freedom — in proportion to the degree

in which this exists — is that it emancipates itself from the past and produces a new future; seemingly it is initiative, and to some extent creation, at any rate it is progress. Thus it prefers even the Utopia which seeks the ideal and gives at least a presentiment of it, to a routine satisfied with what has been and what is. Eager, moreover, for what is new, which we often confound with what is best, enterprising even to the point of temerity or folly, we incline to send our thoughts on adventurous expeditions like those of the Gauls to Greece and Rome. Has not each of us in France, even those of us who call ourselves most matter-of-fact, a little Utopian isle within him, where he loves to take refuge, and to construct a society according to his desires, a government which should be perfect *for all the world*, a realm exactly to his liking where reason should reign supreme! Social renovation and perfectibility, which are indeed the special objects of socialism, are perpetual temptations to us in France; to some extent, we are all socialists.

§ 16. *Good and Bad Effects of the Doctrine of Progress.* This tendency of the French spirit leads to overbold experiments in written law and political practice. We often disregard actual conditions, those of national unity, governmental authority, civic and military discipline. Let us beware lest a loosening of all social and political bonds should result in disorganization. An ill-regulated freedom, ill-advised of the determinism of exterior conditions, easily engenders license; it oscillates between anarchy and despotism. We have made more than one unfortunate experiment of this kind, in which our incapacity to distinguish the possible from the impossible has been conspicuously displayed. We console ourselves by saying that it is only by seeking that we shall find; that no one would ever have learned to

walk except by falling. Nevertheless, we should not put too much faith in downfalls.

It is true that when we fall we rise quickly; and that is one form of perfectibility. In our race, the brain seems prompt to adapt itself to circumstances and to new ideas, and also to profit by them. This aptitude is particularly striking among the ranks of the people of France. They are quick to grasp new ideas and new sentiments, especially if these are of a lofty character; they are prompt to reach the high level of their writers, their thinkers, their philosophers, especially upon social or political questions. They know how to follow these leaders, how to outstrip them at times; often they go too far. In other countries, the people seem to be a heavy mass, hard to rouse or to uplift; there is no doubt less spring, elasticity, spontaneity, in their constitution. So absorbed are they in their local ideas that they respond less readily to universal thoughts, to broad juridical or political conceptions. Unless some example from without stirs their inertia, they do not feel a restless desire for change and progress in the same degree. Now the spirit of perfectibility, the faculty of rapid adaptation to a new environment, is of no less value to a nation than it has been to certain species of animals which, by reason of it, have survived in the struggle for existence. How often have we asked ourselves, with Heinrich Heine, whether France, the nation "which began the great revolution of Europe, is not at the point of perishing, even while her followers are gathering the fruits of her heroic martyrdom!" Heine replies jestingly, "No, the Frenchman will never break his neck, no matter from what height he may fall, and he always alights on his feet." This does not imply dexterity alone; the reason for this indomitable vitality is an instinct for independence and for progress, which is stimulated even by disappoint-

ment, and which engenders a persistent confidence in the final triumph of justice. Still, let us not exaggerate this confidence, lest we ourselves become victims of it.

§ 17. *National Traits Revealed by the Religion of the French.* The worship of freedom and justice, with a frequently blind faith in their ultimate triumph, has been so far developed in France that it tends to efface almost every other cult. There can be no long-lived, permanent religion in modern France except the religion of law. Renan speaks somewhat ironically of what he calls the "democratic religion"; he is certain that in the beginning, it had, like all the others, its mysticism and fanaticism. Nevertheless, it has this singular character, that it implies nothing supernatural. The idea of the supernatural has less weight in France than anywhere else, for to those who still cherish it it is now only a superstition, to others an error. The French people are too rationalistic to take the middle course of compromise, of halfway measures, of half faith which is also half incredulity, of what they regard as a more or less self-conscious hypocrisy. Their faith presents to psychological analysis nothing complicated or difficult; in the way of positive religion, they believe everything or nothing. So they will not turn from Catholicism to Protestantism, as they are nowadays being urged to do by some of our philosophers who are preaching in the desert[12]; they will not continue affirming the divinity of Jesus after they have refused the communion, nor will they pretend that they are Christians because they are philosophers. If a Voltaire tries to overturn the altar, he will not, like the German exegetes, attempt to make it appear that he is trying to lift it up. Beyond the Rhine, it is often the teachers of theology who undermine theology, even while they continue to teach it piously in

[12] *Renouvier*, for example.

their official chairs. Victor Cousin once possessed a curious medallion, struck at Berlin in honor of Hegel, who had proudly presented it to him; on the reverse, Hegel is represented as an ancient philosopher, writing at the dictation of an angel who is leaning for support on religion, holding in her arms the cross of Jesus Christ. In fact, all the great German philosophers have been stout theologians. On this side of the Rhine, however, we are weak, very weak indeed, in theology, unacquainted with the learned and subtle arcana of dogmatics, canonics, and exegetics. Would-be slanderers insist that a mere "privat-docent" of Germany, or the humblest teacher of England, knows more on this subject than all of our faculties of theology. Most Frenchmen will accept this criticism as a compliment. We may explain the fact by saying that theological incredulity is much more deep-seated in the German systems than with us. Voltaire, like Boileau and Molière, calls a spade a spade and a falsehood a falsehood, without subterfuge, without hyperbole, without parables or symbols. This is not always the best way to appreciate things from an historical point of view; in this particular, a Voltaire is far from being a Strauss. But from the purely philosophical point of view, France shows, in this respect, independence of both character and intellect. The mind which looks for subterfuges and shrouds itself in obscurity does not seem absolutely independent, even when it bids us perform acts of independence; nor does it seem sufficiently logical when it admits a principle, but insists on rejecting its necessary consequences. So France regards herself as the real motherland of the freethinkers — "libres penseurs"; this term, expressing independence of thought, is essentially French. And we have in mind here not merely the professional men of thought, philosophers, scholars, or others of lofty intel-

lectual culture, but rather the multitude, the people properly so called, the workingmen and even the peasants. In Prussia, in England, and in the United States, the people feel no need of changing their religion or of rejecting all religion; they continue to read their Bibles, to observe the Sabbath, and to sing hymns, without constantly asking themselves this question, which is as frank and direct as a problem in law: "Am I a Christian, yes or no? Have I the right, yes or no, to go to church as if I were a believer?" In France, we have the almost unique example of a people who are freethinkers through and through. Similarly unique in history is the great social and political movement carried out by the mass of the French people, in the French Revolution, under the influence of a purely moral and religious idea with no admixture of religion and even contrary to every religious idea. Since that time, many have considered ethics to be *independent*, law to be independent, and politics to be independent. That is why no nation has restricted more than has France the rôle played by religious traditions in legislation. Our code is on the whole neither Catholic nor Protestant; it establishes the rights of man as purely human, in no sense divine and theocratic. It has been said that the absence of religious faith weakens just so much our national forces. It should be remembered that this faith is replaced by another kind of faith which, we must admit, has also its dogmas and perhaps its illusions — faith in just law and in fraternity, faith in progress; and this other belief is also a force. So there is little ground for denying that the French have a faith which is a source of power. Only, it tends to confound itself more and more with science, to become purely rational and social, and in consequence, purely republican.

§ 18. *Liberty the Primary Basis of Law.* Among these many traits, which, in a frequently excessive form, manifest a disposition hostile to obstacles and limits, and consequently to all forms of bondage and servitude, the "psychology of peoples" can scarcely fail to recognize as our essential characteristic a love of freedom, often immoderate to be sure — freedom not for ourselves alone, but for all men and all nations. It was upon human liberty, set forth as a prerogative superior to all things, worthy of the respect of all men, equal for all, that France was finally to found the idea of law; there was no interest, there was no material force, which could surpass in her eyes that rational and moral power.

Yet for the French this is only the first foundation-stone of law; they do not comprehend liberty apart from *equality*, for which we now have to show their deep-rooted instinct.

§ 19. *Liberty and Equality are Inseparable.* All observers are agreed in attributing to the French a love of equality; some go so far as to say that France loves only equality, and not liberty. This is an exaggeration which, when we examine it closely, barely escapes self-contradiction. De Tocqueville did not avoid it entirely when he was pleased to contrast systematically two tendencies which are in reality inseparable. Is it not precisely because France loves liberty that she loves equality? To the French, what is inequality, if not privilege for one man and servitude for another, and consequently a lack of liberty? Inequality seems to them an infringement of common rights, a distinction set up between the person of the noble or the rich man and the person of the commoner or the poor man. To recognize no rights, no benefits, no social classes, no privileged dynasties superior to oneself, is to feel that human dignity is as respectable in oneself as in others, and for the same

reason; such has always been the French instinct. Even our peasants used to sing:

> Nous sommes hommes comme ils sont,
> Des membres comme nous ils ont;
> Tout autant souffrir nous pouvons,
> Un aussi grand cœur nous avons.[13]

The legislators of 1789, when they established equality of rights for all, purposed by that very act to safeguard the liberty of all.[14]

§ 20. *Spirit of Equality Peculiar to the French.* Inequality, in the eyes of the French, is an offense against reason no less than against liberty; thus it could not satisfy the logical mind any more than it could the juridical instinct. The exceptions, the self-contradictions of formal law and the resulting inequalities among citizens, are necessarily painful to their intelligence, extremely devoted as it is to whatever is general and "conformable to principles." The English and the Germans do not feel this need. They generally adapt themselves to their lords and their country squires; they have kept the spirit of the feudal hierarchy. France is the only country which really no longer possesses a nobility. After all, have the English laborer who admiringly watches the nobleman go by in his carriage, or rather the carriage in which the nobleman rides

[13] We are men, as they are,
They have bodies, as we have;
We can suffer just as much,
And our hearts are just as large.

[14] Doubtless there are nations who, like the English, believe that they can attain liberty without equality, and even through inequality itself; but to the French mind this is an optical illusion. In England, in fact, wherever liberty exists, there true equality exists also. A recognition of the right of free speech and of the freedom of the press, for example, results in an equal freedom of all citizens to speak and to write; thus liberty and equality coexist. On the other hand, privileges in respect of the ownership of land constitute at once an inequality and an infringement of the liberty of some to the profit of others.

unseen, and the German who reveres his lord and master the Emperor, as well as all his other lords and masters, — have these two a sense of common right in the same degree as the French workingman who says, when he sees some one richer in this world's goods than himself, "One man is as good as another"? Have they as much of a sense of independence and personal dignity as that peasant-soldier of the Revolution who replied to a refugee boasting of his ancestors, "I myself am an ancestor"? There has been ample ground for saying that the Revolution, in proclaiming equality, wished not to destroy the true nobility, but rather to confer nobility upon thirty-two millions of men.

Unfortunately, we have not only evinced a certain spirit of insubordination, produced by the instinct of equality, but we have more than once let ourselves be too easily consoled for absent liberties by a false equality. This is doubtless because equality, for us, presupposes a kind of justice even in injustice, a certain common right even in the violation of a right. Furthermore, even if the outward and political liberties are lacking, equality before the written law seems to us at least a recognition of human liberty and dignity, "in principle" if not in fact. After all, the outward liberties are advantages of a rather more individual character, guaranties of a somewhat more personal nature; and it is a recognized fact that the French are only too ready to disregard individuals and private interests. Thus equality satisfies their sense of impersonality and impartiality; if there is a yoke to be borne, let it at least be borne in common, so that it may be felt by all, hated by all, and when the right moment comes, broken by all at the same time. This is only another example of their excessive and improvident confidence in the omnipotence of the human will and of the "free agent."

§ 21. *Manifestations of the Spirit of Equality.* Before it regenerated the civil and political order, the instinct of equality was given material expression, in the economic system of France, by the progressive division of property among all of the citizens. This movement preceded 1789. Our recent historians have shown us that it was well under way by the beginning of the Revolution, which was, in a sense, an outgrowth of it.[15] Unquestionably the psychology of a national character is revealed in the political economy of a nation, as in all else. The instinct for freedom takes shape as an instinct for ownership; the instinct for equality, as a more and more nearly uniform division of property. If the peasant and even the workingman are acknowledged to be more generally thrifty in France than in other countries, more zealous in saving for a future day, more desirous of investing their savings in some personal or real property, — if their foresight offers a contrast to the often blind prodigality of the English or the German [16] workingman, — it is because they feel that in the form of property freedom and labor possess concreteness, hold a guaranty of independence, and find a refuge from the hazards of fortune or the encroachments of men. They also feel that since freedom should be equal, property, which is the external guaranty of freedom, should itself become more and more nearly equal among all men. Besides, if the true foundation of the right of property is labor, as the French people have

[15] In 1785, *Arthur Young* was amazed to see "the land thus divided up" among us. In 1738, the Abbé de *Saint-Pierre*, after making inquiries from stewards, remarked that in France "nearly every day-laborer has a garden, a piece of vineyard, or some other bit of land" ("Œuvres," Rotterdam edition, v. x, p. 251). In 1697, *Bois-Guillebert* deplored the necessity under which the small landowners found themselves, in the time of Louis XIV, of selling a large part of the possessions acquired in the 1500s and the 1600s.

[16] See the reports on the expositions of Vienna and Philadelphia.

always inclined to believe, and as the Revolution affirmed, then, where all men are working, all ought to have property. Here again national tendencies manifest their divergence; the observation has been well grounded that in doubtful cases and disputes over property, the French have usually adjudged the land to the man who tilled it and have put the law on his side; the English, on the contrary, have pronounced in favor of the nobleman and have driven out the peasants, so that their land is now cultivated by none but day-laborers. Michelet and the entire democratic school looked upon this as one of the moral and human characteristics of our Revolution; man, man's freedom, and man's labor seemed to the reformers of 1789 to be of a value which could not be counterbalanced by mere wealth. Thus it is that in France man has taken possession of the land, while in England land has taken possession of the man. "There is an important moral difference. Let the possessions be great or small, they put courage in the heart; many a man who would not have respected himself on his own account, respects and esteems himself because of his property." Progressive equality of fortunes is virtually only the distributing of respect among all men, and the expression in material form of equality of rights. In Germany, as in England, ownership and land have retained a mystic and feudal character, instead of being regarded as human institutions created by labor; divine right, also, and the right of conquest by arms, two forms of aristocratic privilege, still underlie both legislation and popular thought in those countries. Ours is the only social economy which is truly democratic in its essence.

The feudal character and the spirit of inequality are no less persistent in the English or even in the German family, where the husband is often a lord, a suzerain.

In England, the personality of the wife almost wholly disappears in marriage; she enjoys no right of personal property, she has no power over her children, she may not make a will without her husband's consent, and her husband may will the guardianship of the children away from the mother, who has no personal claim upon them. The head of the family may thus hold his wife in subjection, administering and perchance dissipating the family fortune without giving any account of what he is doing. The same seignioral relation generally exists between the father and the children, with no familiar intimacy, no voluntary equality in matters of affection, relations which need not of course exclude respect. Finally, there is inequality in the relations of brothers among themselves, between the eldest and the youngest; they maintain a hierarchy of commandment and obedience. In Germany also, the father is the supreme lord; the wife and children are often veritable vassals. In the French family, as in the French State, equality tends to increase with liberty itself, drawing after it its inconveniences and also its familiar advantages; greatly diminishing the authority of the father, cultivating early the minds of the mother and the children, uniting all their hearts by a most tender and freely accepted bond. Hence there has come into being in France, in the bosom of the family, a better developed idea of "women's rights," of children's rights, and at the same time a pervading sense of fraternity and affection, through which the father tends to become only a more deeply respected brother to the children, and the mother a more beloved sister. In a word, while among the other peoples the family retains the aristocratic form, in France it tends to became republican.[17]

[17] For more details on this point, see our reply to a letter from *Spencer*, in our "Science Sociale Contemporaine," p. 168.

§ 22. *Equality Must Stand Second to Liberty.* Thus, in the family as well as in the State, in the realm of economics as well as in the civil and political domain, liberty and equality have always appeared to the French mind as inseparable. But if France has maintained these terms in an indissoluble union, she has considered it no less important to avoid reversing their rational order. The Americans began their enumeration of rights with equality; Robespierre also gave it the first place — we all know what order finally prevailed. Right does not consist in an attempt to put all things on the same level, but in an equalization of liberties. Two men who drag cannon-balls of equal weight are not for that reason free men. Equality under a master, as Cæsarism would like to see it exist, is only a vain delusion. Nothing is more inconsistent or capricious than the will of a despot; he grants a favor to one, and refuses it to another; he punishes one and lets another go free. There is enough of the arbitrary in the state of servitude to make equality impossible; hence it is equality in freedom and not in bondage that constitutes the right.

§ 23. *Possible Misapplications of the Idea of Equality.* It is true that we do not always reason as accurately in practice as in theory. We pass very easily from the genuine to the false equality, to that which acts as a leveler and not merely rejects factitious or artificial inequalities, but even disregards natural inequalities. Have not certain egalitarians proposed to establish by law equality of brains, and even of "stomachs"? Moreover, there is an obvious danger in the realm of politics, in not knowing how to obey, how to respect the authority which springs from equality as well as from liberty itself.

§ 24. *Defects of the National Character.* To sum up, our faults are due to the want of what other nations

have in excess; rationalists and logicians we are, to excess, but not in sufficient degree naturalists or even metaphysicians, in the correct sense of the word. We are too much disposed to regard society as an ensemble of independent individuals, of co-equal mathematical units, which join together by an act of free will according to the rules of logic and geometry. In spite of the work of the Positivist and the historical schools, we are still deficient in a sense of *life* and of *history*. We are not yet sufficiently familiar with the idea that human society is not merely an aggregation of *rational* wills, but is also a living organism, subject to the laws of physiology and biology. We forget that a living body does not change over night; that if the cutting and clipping of surgery are sometimes necessary, the imperceptible operations of hygiene and medicine are still more so. Just as we too readily conceive of freedom in the form of free will, so we believe that society can be regenerated through the agency of free will, of enactments, and of improvised laws and constitutions. We forget the great *factor* in biology and history — *time*. This leads us to create artificial breaks of continuity between the present and the past; we want to start with a *tabula rasa*, we want to re-read the book from the first line to the last. There are Frenchmen for whom France begins in 1789. We lack feeling for tradition and historical solidarity. We trust too much to revolution, and not enough to evolution. The profound and complicated determinism of living nature escapes our excessively geometrical minds which reduce all things to abstract theories. Furthermore, we lack a sufficiently developed metaphysical sense; we understand well enough that there is something sacred in an individual, but we do not comprehend quite clearly that in a certain sense a nation is itself a living individuality,

not merely an accidental and artificial collection. Our legitimate fear of metaphysical entities causes us to overlook realities themselves. The result is that every question of right which we have to consider narrows itself down too much to a relation between two individuals, and we are prone to forget the connection of the individuals with the whole, with the social organism, a connection which seems also to be an essential element in the problem.

§ 25. *Means of Remedying Our Defects.* It is therefore desirable that our national spirit, whose most conspicuous trait is the facility for clarifying, expanding, and assimilating the ideas of others, should borrow of the genius of other nations, inasmuch as this will be either more metaphysical or more practical and historical. Apparently, with our democratic and egalitarian spirit, we need have no fear of the excesses into which the other nations are led, whether these nations permit the final absorption of the individual into the nation or into the *universal spirit*, whether they reduce societies too much to a play of interests or to a purely biological development of necessary functions. It is rather the opposite excess which we have to fear. If we should confine ourselves too closely to our atomistic conceptions of the social order, it would be at the risk of bringing our society into a state of dissolution; it is precisely because we are to-day, in the interest of "the world," carrying on the experiment of a republican society, which is evidently what the world is coming to, that we should take it upon ourselves to draw closer the bonds which still unite our national organism. Instead of trying to break all ties at once, we should endeavor to reconcile the continuity of social life with the progress of "reason," which is always in search of something better. The two devices, *change* and *dura-*

tion, far from being incompatible, presuppose one another; let us not dwell upon the first to the exclusion of the second.[18]

[18] If we are not mistaken, these ideas should dominate the education given to the people to-day by virtue of the law providing for free compulsory instruction. Our social and political future depends in great measure upon the teaching of universal suffrage. This teaching need not be *extensive*, but it must be *very sound* and at the same time *on a very high plane*. We must maintain by public education the good qualities of our national spirit and correct its faults.

CHAPTER III*

ANTECEDENTS OF THE PHILOSOPHY OF LAW IN FRANCE

THREE MAIN INFLUENCES — THE STOIC INFLUENCE — THE CHRISTIAN IDEA OF LAW — THE BEGINNING OF DESCARTES'S INFLUENCE — DESCARTES, LOCKE, AND ROUSSEAU — THE PRINCIPLE OF UNLIMITED PERFECTIBILITY — A NEW RESULT OF FREEDOM — THE INFLUENCE OF LOCKE — EMPHASIS ON HUMAN LIBERTY.

§ 26. *Three Main Influences.* The legal philosophy of which the Revolution was the application was subject to three diverse influences, those of Stoicism, of Christianity, and of English sensationalism; but these influences did not rob it of its originality.

§ 27. *The Stoic Influence.* The Stoic and Platonic influence may be seen in the pages with which Montesquieu prefaced the first book of his "Esprit des Lois," although he made no use of it in the following books. Rousseau demonstrated the insufficiency of that kind of metaphysics. To define the laws of the necessary relations which are derived from the nature of things, was to define only natural laws, and to disregard social laws, which, ideally, are free relations of wills. To say that law is "reason governing all the peoples of the earth" was to hold to an abstract formula which could furnish no foundation for real law — but which might even become a vindication of despotism in those who

* [This and the following chapter = chapters vi and vii, livre i, of *Fouillée's* book. — Ed.]

make professions of representing reason and truth. Furthermore, although admitting these general definitions and these old-fashioned commonplaces, the French democratic school, in its philosophy of law, sought to derive reason from liberty itself, and universal law from a positive agreement among individual wills. If the Stoic, Roman spirit persists in the spirit of the Revolution, whose true nature it has sometimes even changed, at least it has been outrun, and merged in quite different inspirations.

§ 28. *The Christian Idea of Law.* The same may be said of Christianity, to which some have tried to trace whatever is purest in the French Revolution. Undoubtedly Christianity, by expanding the idea of universal brotherhood (already familiar to the Stoics), and by exhibiting more clearly the moral greatness of humanity, bestowed upon man an inestimable value; but this after all was only a borrowed value coming to him from on high. The same principle which concedes it to us takes it away, for if the worth of man comes wholly from God, then he is worthless on his own account, and the merit which he seems to acquire is a free gift for which he deserves no credit. The philosophy of the 1700s rejected this idea of attributive value, this supernatural origin of man's titles, and demanded that man be respected for his humanity, not for the divine grace of which he is the object; furthermore, it sought to bring down the divine principle into man, to consider man as divine in and through himself. This is what was later called "the divinity immanent in man," substituted for the dogma of a transcendent divinity. Under Christianity, human liberty is limited by grace; it is, indeed, itself a work of grace. Moreover, as it is a cause of evil as well as of good, its significance is only in its acts and not in itself; it is a means and not an end,

the idea of eternal salvation or of eternal damnation necessarily subordinates liberty to interest of eternity. As to equality, it is purely religious; still, we may not say that men are truly equal even before God, for grace is unequally allotted. The workers of the last hour are more generously treated than those of the first; equality of deeds, even of deserts, does not establish a real equality before the sovereign judge. For still stronger reasons, there is no equality of rights in His eyes, in that God owes nothing to man, and man has no rights, properly so called, before Him. In relation to other men, a right implies a claim; and here again Christianity recognizes hardly anything but duties. It dwells above all on patience, resignation, and martyrdom; it turns the other cheek to the oppressor. We may add that the very idea of grace involves that of inequality, because it implies something arbitrary; equality and favor are reciprocally exclusive. Many are called but few chosen; election signifies a gift to some which is refused to others. How could this inequality, thus erected into a dogma, fail to prevail in the social order, where all was hierarchy? As there are nobles and knaves in the kingdom of grace, so much the more must there be in the kingdoms of the earth. Fraternity even, a lofty conception of which is predominant in Christianity, rests on two principles foreign to the modern mind; first, on the fatherhood of God, a mystical, theological principle, and second, on the fatherhood of Adam, a purely material and historical principle. Theologians do not hold to the natural, moral conclusion that a supposedly rational and practically free being, whatever his celestial or his terrestrial origin, is by that fact a brother of every free and rational being. Christian brotherhood extends only to the elect, and like heaven itself is closed to reprobates, refusing to heal, or even

to love them. Justice under Christianity rests in part, like fraternity, on a carnal and material principle. As a consequence of original sin, justice and injustice are in the blood; and individual responsibility is absorbed in a kind of collective responsibility, a kind of blood relationship. Finally, ideas of progress and of perfectibility did not yet exist in pure Christianity, for which the earth was only a transitory place of probation and exile. The Middle Ages, with eyes fixed upon the life to come, professing a certain disdain for the present stage of existence, strove for indifference to the happiness which might here be enjoyed, and to the progress which might here be made. Cannot one become sanctified in any social sphere? That is sufficient; for the rest, let us wait for death. Even philosophical speculations were all directed towards that mystical region which is beyond this world and above humanity. For all these reasons, the worth of the individual remains religious rather than civil and political. According to the old conception the individual, though becoming a center and an object of love in the spiritual and celestial city, as a civilian is absorbed in the State; he is outside the civil authority only in his religious conscience, which itself is subject to religious control.

§ 29. *The Beginning of Descartes's Influence.* We know how, in the 1500s, the abuse of this authority led, at the Reformation, to a reaction in favor of the individual conscience. Then philosophy, distinguishing little by little the domain of faith from that of knowledge, declared through Descartes that the testimony of the individual was the sole guide in research, whether philosophical or scientific. This is as much as to say (and it is a capital principle) that, in the intellectual order, the freedom of a reasonable being finds its rule and its law within itself; that union and equality of

liberties can engender a true authority; or, in other words, that freedom of speculation, far from ending in intellectual anarchy, should finally lead to order and a union of minds in the republic of learning. At the same time Descartes, whether right or wrong, represented intellectual affirmation as an act of will, assuming that the will is not essentially indifferent and arbitrary, but that it is rather in natural harmony with the truth, provided that it acts without hindrance. Descartes everywhere subordinated intelligence to will, even in the world's first cause, because to his mind will was the essence of being, of good, and of perfection.

§ 30. *Descartes, Locke, and Rousseau.* The philosophy of the 1700s, faithful to Descartes's true method, and inspired at the same time by Locke, applied to civil and political questions the modern principle which seeks to found authority on freedom itself. Knowledge had been seen to organize and regulate itself, under a kind of democratic régime, all the better because it was free, and to become universal in the end in the same degree as it had been individual in its origin. The question was raised whether freedom, in the social as in the scientific order, could not of itself create authority, and thus become a law to itself; in short, whether complete harmony among all men might not grow gradually out of perfect freedom for every man. Rousseau was the first to formulate — and he did it admirably — the problem of civil and political rights, which is at the same time the problem of natural law: "To find a form of association which defends and protects with all the collective power the person and the property of each associate, and by wihch each, although uniting with all the others, is nevertheless subject only to himself, and remains as free as before." The human will thus tends to become the first principle of the whole social

order. Descartes had maintained that in God all necessary truth issues from a free will, and that necessity is consequently an indirect expression of liberty. Similarly and with greater probability, may we not say that, in the social order, this sacred necessity which we call law, instead of having a mystical and metaphysical origin, is simply the abstract expression of the general will? May it not be merely the ideal agreement, the common direction, the mutual guaranty of all individual wills? This is the profound conception by means of which the school of Rousseau referred law to will respecting itself and asserting itself. Mirabeau, a disciple of Jean-Jacques, remained faithful to his master in defining law as "the inviolability of liberty," adding that "law is the sovereign of the world." As to the moral and metaphysical consequences of this doctrine, these were summed up by Hegel when he said, "Rousseau declared that will is the essence of man; this principle is a transition to the philosophy of Kant, of which it is the foundation." At the same time Rousseau had a glimpse of the theory of the social organism, which he was unable to reconcile with that of the social contract.[1]

§ 31. *The Principle of Unlimited Perfectibility.* In conceiving of the future of the world as resting henceforth upon human liberty, the French philosophers found themselves logically impelled to regard this as a principle of unlimited perfectibility. Of this character of infinity which Descartes ascribed to the will of man, and which he regarded above all as a metaphysical attribute, the 1700s made, so to speak, an historical attribute, by conceiving it as an infinity of development and progress, extending through space and time. The principle of "unlimited perfectibility," already in the germ in Descartes and Pascal, and clearly formulated by

[1] On this point, see our "Science Sociale Contemporaine."

Turgot and Condorcet, was to revivify not only the philosophy of history, but also that of law. The reign of liberty, equality, and fraternity, postponed by Christianity to another life, and awaited as the gift of God, the 1700s hoped for in this world, and demanded of man; heaven came down to earth as an ideal which to be sure could not be attained but which might always be more and more nearly approximated.

§ 32. *A New Result of Freedom.* Finally, the theory of moral and scientific progress could but bring in its wake, as a social consequence, the conception of economic and political progress. Bring the idea of freedom down from the heights of abstract metaphysics to the domain of positive reality, and it will take on a new form and a new name; it will be called property. Every question of pure legal right turns out to be a question of property. Now it was in France, again, that political economy was developed; the best distribution of rights among all men called for the best distribution of wealth. It was the same problem carried over from the moral to the material order. It is important here to notice a fact often forgotten or disregarded; it is that the idea of property and that of legal right always move side by side, both equally vague in Christianity, and both quite distinct in the philosophy of the 1700s, as if they were only two aspects of a single idea. What we call to-day the right of property, a natural right independent of civil or religious authority, is a wholly modern conception, opposed by philosophers to the old tradition of jurists and theologians.[2]

[2] On this point, read in *Janet's* "Histoire de la Science Politique" the doctrines of the Fathers and the doctors of the Church. One cannot fail to conclude with him that "the doctrine of a right of property, prior to and superior to the sovereign will of the State, is an entirely modern and revolutionary doctrine, which dates historically from the three revolutions, English, American, and French, and which is first met in theoretical form in Locke and the French economists." "The earth,"

§ 33. *The Influence of Locke.* It was Locke, and following him Quesnay, Mercier de la Rivière, and most of our economists, who introduced between liberty, that invisible property, and property, that liberty made visible, the middle term of labor. It was at this point, especially, that French philosophy felt the influence of Locke, which combined with that of Stoicism and of Christianity. Nevertheless French philosophy preserved its own original character. Locke, like all the English, was preoccupied chiefly with interest; freedom was above all a means of securing the greatest total utility, either for the individual or for the State. The French, in appropriating English ideas, generalize

said *St. Ambrose*, "was given in common to the rich and the poor; why, ye rich, do you arrogate property to yourselves alone? Nature has given as common property all things for the use of all men, has created the common right; *usurpation has made private right.*" The distinction between rich and poor seemed to the early doctors neither more nor less unjust than that between master and slave. "There is neither slave nor master before God," said *Lactantius;* "there are no poor before God except those who are wanting in justice, nor rich except those who abound in virtue."

"By what law," said *St. Augustine*, "does each man possess that which he possesses? Is it not human law? For, according to divine law, God made the rich and the poor from the same clay, and it is one earth which bears them. It is therefore by human law that one may say, This city is mine, this house is mine, this slave is mine. But human law is nothing but imperial law. Why? Because it is through emperors and kings that God distributes human law to human kind. Take away the law of the emperors and who will dare say, This city is mine, this slave is mine, this house is mine?" (See *Ambrose*, "De Officiis" I: xxviii; *Lactantius*, "Divine Institutes," V: xiv; *St. Augustine*, "In Evangelium Johannis Tractatus," vi, 25, 26.) Gratian's decree declares that "according to natural law, all things are common among men." (pars I, dist. vii). *St. Thomas* adopts this orthodox principle and is compelled to attribute property to an invention of human reason, "ad inventionem rationis humanæ," which adds private *possession* to natural right on condition that *use* be in common ("Summa Theologiæ," II, 2, q. lxvi, a. 1). Finally we know *Bossuet's* doctrine: "Take away government, and the earth and all its riches are as common to men as air and light. . . . According to this primitive law of nature, no one has a private right to anything whatsoever, and everything is the property of all . . . The right of property is born of government, and in general every right should proceed from public authority." ("Politique Tirée de l'Écriture Sainte," Book I, art. iii, prop. 4.)

them, apply them to all human kind, and furthermore, substitute a moral for a purely utilitarian sense. They demand liberty and equality for what they are, and not for any material interest which might be superior to them. Moreover, the French revolutionary school was from the first aware of a difference between the premises, notwithstanding a similarity in the conclusions. Condorcet, for example, found fault with the American Constitution "for having taken as its principle identity of interests even more than equality of rights." "The principles upon which the constitution and laws of France have been constructed," he says again, "are purer, more profound, and more precise than those which guided the Americans; the French have escaped much more completely from the influence of every kind of prejudice. Nowhere has equality of rights been displaced by identity of interests, which is only its weak and hypocritical supplement."[3]

§ 34. *Emphasis on Human Liberty.* In conclusion, in the three doctrines which served as antecedents to our philosophy of law, the Stoic, the Christian, and the English, human liberty was always regarded as a means rather than an end. The Stoics finally merged it in universal reason, the Christians in divine grace and future salvation, the English school in personal or general interest. In French philosophy, on the other hand, a new tendency is apparent from Descartes to Turgot, Condorcet, and Rousseau, which finds in human liberty an end in itself, to be cherished for its own beauty, for its limitless fecundity, and in some sort for the infinite progress which it embodies.

[3] "Tableau Historique des Progrès de l'Esprit Humain," ninth epoch.

CHAPTER IV

THE IDEA OF LAW IN THE FRENCH PHILOSOPHY OF THE 1800s

MODERN CRITICISM OF THE IDEA OF LAW — THE DOCTRINE OF SAINT-SIMON — AUGUSTE COMTE, EXPONENT OF POSITIVISM — THE DOCTRINE OF FOURIER — PHILOSOPHICAL IDEAS OF PROUDHON — THE SPIRITUALISTIC SCHOOL — LIMITATIONS ON THE DOCTRINE OF MORAL FREEDOM AND EQUALITY — THE NEED OF A SYNTHESIS OF DOCTRINES.

§ 35. *Modern Criticism of the Idea of Law.* Let us pass now from the 1700s to the 1800s, and rapidly trace the later transformations of the French theory of rights through contemporary schools of philosophy. We shall see its inquiries becoming at once more definite and more difficult, until now they demand a fresh examination, and if possible, a new solution.

§ 36. *The Doctrine of Saint-Simon.* The philosophers of our century who have either criticized or defended the idea of rights bequeathed by the Revolution may be divided into two groups: one, the partisans of moral and historical fatalism, and the other, the partisans of freedom in the conscience and in history. The former were dissenters from the philosophical school of Rousseau and the Revolution. First among them appears Saint-Simon, whose influence, although nowhere widely avowed, is still widely but feebly felt. Against the idea of individual liberty he set the old conception of social authority, the source of which he placed successively in science (a

doctrine out of which Positivism was to grow), then in industry, and finally in a new religion "capable of compelling the obedience of its followers to the precept of neighborly love." The school of Saint-Simon thus approached the theocratic school, which is hostile to the idea of freedom and equality.

§ 37. *Auguste Comte, Exponent of Positivism.* Positivism, an outgrowth of Saint-Simonism, rejected in its turn the idea of moral freedom. A right, properly so-called, is for Auguste Comte and his successors, like absolute duty, a metaphysical entity, because it includes another conception of the absolute, a conception of "cause" acting on its own account and worthy of respect on its own account. Abandoning, then, the tradition of the 1700s, Auguste Comte refuses all consideration of the rights of man. "Positivism accords to no man any right except that of always doing his duty. . . . The idea of rights should be banished from the domain of politics, as should that of cause from the domain of philosophy. . . . Positivism admits of nothing but duties, of all men, towards all men; for its point of view, always social, is inconsistent with any idea of *rights*, which are always individualistic. . . . Any human right is absurd as well as immoral. And since there are no divine rights, this idea should be completely obliterated, as merely relative to the preliminary stage, and wholly incompatible with the final stage (of humanity), which recognizes nothing but *duties* according to *functions*."[1] We see that it was Auguste Comte, the founder of "sociology," who in the interest of social power formulated with perfect logic a denial of individual rights — a denial disguised under the idealism of many German philosophers, and repeated also by the English school, which did not deduce from it, however,

[1] "Cours de Philosophie Positive," vi, p. 454, 2d ed.

the same consequences as to authority. Comte had an infallible scent for metaphysical ideas hidden under the protecting shelter of moral or social expressions, and he has shown rare penetration by recognizing in the idea of rights the idea of cause — of free cause, indeed — in disguise.

§ 38. *The Doctrine of Fourier.* In opposition to the authoritarian schools of Saint-Simon and Comte, there arose, in the very bosom of socialism, the more liberal and more individualistic school of Fourier. Fourier bases all rights, as well as all political economy, on free association. In this he approaches Rousseau, for the mutual "attraction" of men which leads them into association in the absolutely free exercise of their preferences is not without analogy to the will which, according to Rousseau, unites men in a freely accepted contract. But is true association, as Fourier thinks, that of passions drawing together in search of their common satisfaction? Or is it, as Rousseau had said, that of liberties uniting for the protection of their rights? If, contrary to Fourier's expectation, the passions, left to themselves, do not exhibit that internal rule of harmony upon which he counted, must he not return for his basis of rights to some other rule, voluntarily accepted and mutually guaranteed? We also see in France the fatalistic schools passing gradually from the cult of authority to that of freedom, maintaining meanwhile their doubt of the existence of moral and metaphysical freedom.

§ 39. *Philosophical Ideas of Proudhon.* In contrast with these schools, others arose which developed more or less faithfully the thought of the French Revolution. One of the most important of Rousseau's continuers was Proudhon, whose philosophical ideas have not always been appreciated at their true worth. The author of "Justice in the Revolution and in the Church," with

whom one may connect the school of "independent morality," strove to bring into the light again that fundamental principle of the Revolution, the *dignity* of man, rational and free, sufficient in himself to determine his duty and his rights, without reference to metaphysical or religious doctrines. In this also, Proudhon and the advocates of ethical independence continued the work of Kant.[2] "A disciple at once of Comte and of Kant," as he said of himself, Proudhon sought to found man's title to respect upon a fact. "Man," he said, "by virtue of his reason, can feel his *dignity* in the person of his fellow man as well as in himself, and can confirm their identity in this regard. . . . Rights, for each one, are identical with the faculty of exacting from others a respect for human dignity in his own person." But Proudhon did not sufficiently explain this faculty, whose existence he affirmed, since he limited himself to the vague term, *to feel his dignity*. When he undertook to give a more precise meaning to this same dignity, he sometimes contented himself with relating it to liberty

[2] *Proudhon* upholds the human and *immanent* character of law and justice. "I dismiss all theologism, every theory of the absolute. . . . Justice is human, wholly human, and only human; we do it an injury if we relate it, closely or remotely, directly or indirectly, to a principle prior or superior to humanity. Let philosophy busy itself as it will with the nature of God and of His attributes; this may be its duty and its right. I maintain that this idea of God has no place in our juridical constitutions any more than in our treatises on political economy or on algebra. The theory of practical reason rests on its own foundations; it neither presupposes nor requires the existence of God or the immortality of the soul; it would be false if it had need of such support." We know the thesis which was later upheld by the partisans of independent ethics in a journal devoted entirely to this problem. "The right of man in relation to man," continues Proudhon, "can only be the right to the respect of his fellows; but what shall determine this respect in the heart? The fear of God, says the ancient lawgiver. The interest of society, answer the modern innovators, whether atheists or not. This is still to place the title to respect, and therefore the principle of law and justice, outside of man, and consequently to deny this principle itself, to destroy its condition 'sine qua non,' its innateness, its immanence." ("La Justice dans la Révolution et dans l'Eglise," i, p. 84.) It remains to explain the true basis of this respect due to a man from his fellow man.

without distinguishing his doctrine at this point from current theories, and sometimes he seemed to reduce it to a consciousness of force. We know what dangerous concessions he himself made to force in his theory of war and peace. In short, Proudhon sought to base rights on a fact of consciousness, on "the feeling of dignity"; but a feeling is insufficient to explain the character of obligation and necessity with which he clothed the idea of rights. Does it not seem that a right, instead of being merely a fact, is on the contrary an idea extending beyond and rising above the fact which it dominates and judges?

§ 40. *The Spiritualistic School.* The Spiritualistic school, including Maine de Biran, Royer-Collard, Victor Cousin, and Jouffroy, had developed under various forms, too often superficial, the doctrine, traditional in France, which finds for rights and dignity a foundation in free will. A striking instance of this will, for Maine de Biran, is exhibited in the effort of the act of labor; whence, if he had been concerning himself with social questions, he might have deduced the consideration that labor, which is personal force in action, must be the basis of the right of personal property, or more generally of all rights. For Royer-Collard and Victor Cousin, will resides in the power of choice between good and evil, that is, in the free judgment, from which duty and right proceed simultaneously, each responsible for the fulfillment of its own destiny. "What is my right to your respect but your duty to respect me because I am a free being? But you yourself are a free being, and the basis of my right and of your duty become for you the basis of an equal right, and for me of an equal duty. I say equal in the strictest sense of the word, for freedom, and only freedom, is equal to itself. . . . It is not possible to conceive of any difference between the free will of one

man and that of another."[3] Such is the theory which we find, with many shades of difference, both among the immediate successors of Victor Cousin and among the majority of the contemporary Spiritualists. The most recent doctrine of the neo-Kantians does not differ from it notably on the whole. *Phenomenistic criticism* also bases rights upon liberty, which, from that point of view, consists essentially in free will, the ambiguous power of opposites. "The *debit* and *credit* relations of reciprocal agents, that is to say, right and duty as correlative terms, . . . are theoretically summed up, on either side, in terms of dignity — that is, of liberty, of personality itself — and of respect for that dignity."[4]

§ 41. *Limitations of the Doctrine of Moral Freedom and Equality.* From this simple sketch of the principal theories of our century, we see that the doctrine that rights rest for their foundation upon moral liberty and equality has become almost classical in France; and to its tradition the various schools of our country, with the exception of the Positivists, return by more or less circuitous paths. We must believe, however, that this conception of rights contains elements of incompleteness and obscurity, since it falls so far short of bringing minds together not only in Germany and England, but even in France, where it nevertheless furnishes a foundation for the popular philosophy and for the philosophy of the universities. Unquestionably, there are very many unsolved difficulties in this doctrine.[5]

[3] "Justice et Charité."

[4] *Renouvier*, "Science de la Morale," ii, 480.

[5] Since this book was not intended as a history of the philosophy of law, but only as a study of what is fundamental, and particularly of what is new, in the modern ideas of law, we have been unable to review the various less original and less specific theories which have sprung up outside of Germany, England, and France. Italy, however, that land of Roman jurists, has rendered great services, even in our own time, to the philosophy of law, which is still honored and developed there.

§ 42. *The Need of a Synthesis of Doctrines.* The need is now felt of a more synthetic, less simple idea, uniting if possible the elements of truth contained in conflicting doctrines. Besides the normal and rational element, place should be found for the natural, biological, and historical elements. Ideas of determinism, of organism, of evolution, of function, of living force, and of power, as well as those of individual and general interest, should not be eliminated from the discussion. Mechanics, physiology, social science, and political economy should be united with ethics as a foundation for a more comprehensive conception of rights, compatible with both idealism and naturalism.

(See the works of *Rossi, Mancini, Mamiani, Lombroso,* etc.) Among the more recent studies may be consulted those of *Poletti, Ardigò, Garofalo* and *Boccardo,* of *E. Ferri, Siciliani, Puglia, Vadalà-Papale, Cogliolo, Wautrain-Cavagnari,* etc. The last-mentioned, in "Ideale del Diritto" (Genoa, 1883), has developed in particular, with dignity and exactness, the views contained in our "Idée Moderne du Droit." See also "L'Idée Moderne du Droit d'après M. A. Fouillée," by *Regnard* (Brussels, 1880), in which the author tells of juristic studies in Belgium.

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(B) RECENT PHASES OF FRENCH LEGAL PHILOSOPHY

CHAPTER V

THE SOCIOLOGICAL OR POSITIVIST SCHOOL*

HOW THE SOCIOLOGICAL SCHOOL WAS FORMED — EVOLUTION AND THE SOCIAL SCIENCES — THE RELATION OF LAW TO SOCIETY AND THE INDIVIDUAL — A NEW CONCEPTION OF LAW IS NEEDED — THE DANGER IN DEFICIENT IDEALISM — THE USES OF IDEALISM.

§ 43. *How the Sociological School was Formed.* The sociological school has at first glance no very well defined character; it borrows from the two preceding schools certain of their conceptions. Like the historical school, it considers law in its evolution, in its successive changes, and connects these changes with those which are experienced by society itself. Like the Utilitarian school, it sees in institutions the means of satisfying social interests. In Germany and England, it has partially taken the place of each of the other schools, between which it produces a kind of fusion, in that certain of those who represent it often belong also to one or the other of those two. Thus Spencer is at the same time a Utilitarian and a sociologist. The sociological school has been of very great importance in France, and a Frenchman, Auguste Comte, was its founder.

* [Chapters v-xii here — chapters v to xii inclusive of *Charmont's* "La Renaissance du Droit Naturel," namely the entire substance of that book with the exception of its four opening chapters. For this author and the work see the Editorial Preface. — Ed.]

Doubtless it does not admit of a complete unity of doctrine; among opinions which seem to occupy a common ground great differences often exist. Often the tendencies themselves are opposite. Spencer, for example, denied even that he had been influenced by Auguste Comte, and his extreme individualistic tendencies offer a singular contrast to those of most of the sociologists. Besides the school of Durkheim and the devoted group of his co-laborers might be mentioned a number of French philosophers who have been more or less influenced by sociological methods, and who represent, so to speak, so many intermediary shades between Positivism and rationalism.[1] What is especially characteristic of the sociological school is its persistent effort to base ethics on a scientific foundation. It undertakes, according to Durkheim,[2] "to integrate social science with the general system of the natural sciences." This ambition is not a new one; we know that Bentham already aspired to be the Newton of ethics; but the tendency here is much more pronounced. It lays down the method of studying social facts in themselves, establishing them and seeking to explain them, making use at the same time not only of all the processes of observation but also of historical research, of inquiry, and of statistics, in order to ascertain all the conditions of community life. This is, to be sure, just what science does. Is not its object to establish phenomena, to connect them with antecedent phenomena which appear to be related to them as causes, to explain one group by the other?

§ 44. *Evolution and the Social Sciences.* The hypothesis of evolution has thus been applied to the social sciences, as it had been to the sciences of nature. It

[1] For example, *Lévy-Bruhl, Espinas, Belot,* and perhaps *Rauh.*

[2] RE, 1888, p. 29.

has revived linguistics, comparative philology, and the history of religions. The institutions of the civilized peoples have been regarded as the product of selection because the societies which were not able to discipline and organize themselves, which engaged in theft, violence, and assassination, were the agents of their own elimination. The various forms of marriage, by capture, by purchase, by free contract, correspond to progressive stages in the collective life. Similarly, the social criminal law has been substituted for private vengeance. The transition from collective ownership to individual ownership is related to the progress of production.[3]

Thus the law results, as a natural consequence, from the intervention exercised by society in its own interest, an intervention destined to terminate or to prevent conflicts. Far from assuming that the offense presupposes the law, and is no more than the sanction of its violation, we must admit on the contrary, with Gaston Richard,[4] that the law has its origin in the offense. The point of departure is prohibitive intervention destined to obviate conflict. Society, for example, forbids its members to take possession by violence and fraud of property already possessed; it punishes theft, pillage, and marauding, and by that very means guarantees the peaceable possession of wealth and creates property.[5] Moreover, by punishing rape, abduction, infanticide, or the abandonment of infants, it has indirectly revealed the juridical nature of marriage,

[3] "It has been found in Canada that the native inhabitants who live by hunting need the enormous area of 15 square miles (3800 hectares) per capita, in order to live. Below this limit they are decimated by famine. Now agriculture as it is practised in western Europe can support from two to four inhabitants for each five acres [de 1 à 2 habitants par hectare], that is 4000 to 5000 times as many." (*Charles Gide*, "Principes d'Économie Politique," sixth ed., p. 517, n. 1.)

[4] *Gaston Richard*, "Origine de l'Idée du Droit," p. 54.

[5] Ibid., p. 54.

implying the free consent of the woman, and the obligation of parents towards their children.[6] If we stop to consider how the juridical conception of contracts was formed, we are led to think that it proceeds, through a conflict of interests, from measures taken to repress falsification and fraud, the abuse of confidence, swindling, the issue of counterfeit curency; hence is naturally deduced the validity of a contract which is entered into in good faith, without fraud or violence.[7]

§ 45. *The Relation of Law to Society and the Individual.* The law, then, is the ensemble of the means by which each group protects itself against disturbances aroused by certain of its members or by the hostility of other groups, in the effort to bring vital rivalries down to an indispensable minimum.[8] By the very act of showing us how society intervenes to defend itself, to insure its preservation or its development, sociology tends to give preëminence to the interest of society. Auguste Comte considered that, properly speaking, the individual has no rights; he has only duties. "Every man has duties, and has duties towards all others; but no man has any rights properly so-called. No one possesses any other right than that of always doing his duty." [9] We may disregard the relations of individuals among themselves, for the purpose of viewing in the broad the relation of the total mass of individuals to itself; in this sense, society has all the rights; the individual has only duties. Not all the Positivists, it is true, arrive at these conclusions. Some of them, on the contrary, tend to place the individual in opposition to society as a whole. Certain formulas of Spencer

[6] Ibid., p. 55.

[7] Ibid., p. 55.

[8] Ibid., p. 5.

[9] *Auguste Comte*, "Politique Positive," v. 2, p. 361.

would lead us to think that he, like Kant, admits the natural rights of man. "Every man is free to act according to his desires, provided he does not infringe upon the equal liberty of any other man." [10] This principle might seem to have been borrowed from the Declaration of the Rights of Man; but we must not make this mistake. The difference is characteristic. What is here in question is no longer a rational, a priori principle, but simply an idea founded upon this fact of experience, that respect for the individual is good politics, and constitutes the best means society has for preserving and defending itself.[11] In order to progress it must bring together strong individualities; it must take care not to stifle them, to paralyze them, by an excess of regulation, especially at the present time when the industrial system is being substituted for the military social system. Society weakens itself by repressing the individual. But this individualism is more than a simple corrective; it is the consideration due to that competition which must be reconciled with a respect for order. It is none the less true because of this that justice is conceived and established in the interest of society.[12] The development of this society, the progress of the species, is the final goal; and everything will be sacrificed to this end. "The poverty of the incapable, the distresses that come upon the imprudent, the starvation of the idle, and those shoulderings aside of the weak by the strong which leave so many 'in shadows and in miseries,' are the decrees of a large, far-seeing benevolence." [13]

§ 46. *A New Conception of Law is Needed.* Thus the sociological school, the Utilitarian school, and the

[10] "Justice," trans. Castelot, p. 52.

[11] See *Ehrhardt*, "La Crise Actuelle de la Philosophie du Droit," p. 156.

[12] Ibid., p. 158.

[13] *Spencer*, "Social Statics," ed. of 1851, p. 323. [Cf. ed. of 1892, p. 150.]

historical school arrive at almost identical conclusions; they all eliminate the old idea of the law.[14] We find ourselves, then, still confronted by the same dilemma, obliged to choose between two conceptions, neither one of which can satisfy us; either to base the law on an a priori principle which reason does not justify, or else to consider it as a simple expedient, a kind of succedaneum for power; a kind of artifice employed by society for its own ends. The consequences resulting from this state of mind are such as it was bound to produce. They can be perceived, unquestionably, in the present moral crisis, so often pointed out, and described in such striking fashion by Bureau.[15] Assuredly this crisis has many and various causes, but it seems beyond question that it is partly brought about by the decline of idealism, by the fact that individuals are less and less disposed to self-sacrifice.[16] What is no less evident is that the fate of law is bound up with that of morals; the downfall of morals involves that of the law. Indeed, the law is potent not merely through the exercise of coercion; it borrows its authority from the conscience, from the feelings of those who elaborate it and of those to whom the law is applied.

§ 47. *The Danger in Deficient Idealism.* If the legislator repudiates all idealism, he sees in the law nothing more than the means of exacting obedience from others, of making the strength of the social organization serve

[14] "In nature there is no law, there are only facts." *Danten*, "Nature des Choses," p. 154.

[15] "La Crise Morale des Temps Nouveaux."

[16] "In a society like ours, where moral relaxation is general, that we should ask creatures of flesh and blood to resist temptations to which others yield, to choose a life that is often narrow and difficult, to struggle against the calculations of self-interest or egoism, to combat all weaknesses, all pleasures, to endure the anguish of a truly profound and active moral life, is not this to demand of them a heroic effort for which little, bourgeois virtue is far from sufficient, for which a veritable heroism is often necessary?" (*P. Bureau*, BSP, April 1908, pp. 144, 145.)

his political purposes. In a country where the legislative power is unlimited, where public rights are not rights guaranteed by the constitution, the separation of powers is only a fiction. Everything is possible for the legislator, or at least appears so to him; the law is nothing but a means of reducing his adversaries to impotency. If the result is not secured by the first attempt, a second or a third law can always be passed. If the interpretation of a statute already enacted leaves room for doubt, and the question is submitted to the courts, one can, by a law denying jurisdiction, forbid a decision, and by an interpretative law substitute a more favorable interpretation for that which seemed destined to prevail.[17] This is a method of turning about the principle of the non-retroactivity of laws, which moreover is not binding upon the legislator and can be openly violated. In fiscal matters, a system is put in operation not unlike the turning of a screw; the laws are the object of continuous modification; taxes at first moderate are gradually increased.

The same causes create almost the same state of mind in the citizen to whom the law applies. It no longer commands his respect; it no longer seems to him to have any moral value. He demands laws of exemption, laws of privilege, laws of subvention, without regard to the blow thus dealt to public interest. If the law offends or annoys him, he employs every means to escape its effect: ill will, simulation, fraud, and if necessary even violence.[18] Reforms become almost impossible,

[17] Regarding interpretative laws, and especially regarding the law of April 13, 1908, which affected the termination of twenty thousand lawsuits brought against the administration of State property, one may consult the remarkable article of *Barthélemy*, "De l'Interprétation des Lois par le Législateur" (RDP, July, August, September, 1908, and separate issue).

[18] An abundant collection of examples may be found in *Maxime Leroy's* book, "La Loi," in which he attempts to show that everybody in France

because the reformer would have to choose between an uncertain application of the law and measures truly Draconian. The system terminates simultaneously in arbitrariness and in impotency of the law. Without a spirit of legality, society is continually flung from anarchy to despotism.

§ 48. *The Uses of Idealism.* Democracy cannot be a reign of progress, of liberty, of justice, unless the law is respected by him who makes it and by him for whom it is made. Now this respect implies a common faith, a minimum of idealism. On going to the bottom of the matter, we discover that life demands for each of us a certain residuum of sentiment which is not derived from reason, but which reason nevertheless controls.

In order to act, to plan, to profit, by experience, to make our way towards an appointed goal, we must consider ourselves free, must accept liberty as a postulate. To have reasons for acting, for being interested in life, we must become attached to something beyond and above ourselves, must feel supported and guided by certain sentiments, which may be sympathy, duty, or honor. Perhaps it will be said that these are religious feelings.[19]

is working for the downfall of the authority of the law. Let us merely quote after him the text of a manifesto published in 1907 by the federation of the retail merchants of France: "The federation of the retail merchants of France has the honor to inform the affiliated syndicates and its members that in consequence of its vigorous action, the Keeper of the Seals gave his word, at the session of March 28, to discontinue the execution of the judgments rendered under the law concerning the weekly holiday, and to suspend the suits in court."

As a consequence the retail merchants have, until further orders, the right to refuse to pay the amount of the fines, damages, and costs pronounced against them, which over-zealous agents of the administration might claim from them. In case of further proceedings which may appear unjustified, they are urged to inform the secretary without delay. (JR, April 1, 1907; *Maxime Leroy*, "La Loi," p. 320.)

[19] [*William James* thus characterizes the life of religion: "It consists of the belief that there is an unseen order, and that our supreme good lies in harmoniously adjusting ourselves thereto." ("The Varieties of Religious Experience," p. 53.)

It is an assured fact that a good many persons, subscribing or not to a religious confession of faith, seek to produce in their lives a harmony between sentiment and reason. All those persons who aspire towards something exalted and eternal have, in a certain sense, religious souls. The efficacy of socialism, for example, depends upon an inherent religious character; if socialism repudiates all idealism, it is sure to be betrayed constantly by its leaders. As soon as these leaders have obtained satisfaction for themselves, they ought logically, if egoism is everything, to detach themselves from the cause which they have made use of, without incurring any reproach.

Thus, in order to sustain ourselves, to have strength to act and maintain life, we must give due consideration to reason and to mysticism. According to Loisy, "Whoever believes absolutely in the good, in the true, is a mystic; for as we cannot demonstrate strictly the objective value of our knowledge, no more do we demonstrate the value of the moral ideal, without which, however, no individual life, no human society, may be solidly established." [20]

[20] *A. Loisy*, "Quelques Lettres sur les Questions Actuelles," p. 67.

CHAPTER VI

CAUSES AND CHARACTERISTICS OF A RENASCENCE OF LEGAL IDEALISM

A PLEA FOR THE RETURN TO INDIVIDUALISM — THE NEED OF IDEALISM — WIDESPREAD EVIDENCES OF IDEALISM — THE PROBLEM OF THE BASIS OF DUTY — BELIEF IN AN IDEAL IS IRRESISTIBLE — OUR PROGRAM OUTLINED.

§ 49. *A Plea for the Return to Individualism.* When Beudant's excellent book on "Le Droit Individuel et l'État" appeared in 1891, juridical idealism had fallen into singular discredit in France. Beudant revived traditional ideas, went back to the Declaration of the Rights of Man, to the school of natural law, based law upon reason, opposed individual right to the State, and even exaggerated that opposition by seeing in every case of State intervention a restriction of individual right.[1] Without going so far as this writer, we must acknowledge that what he denounced was a real peril; the negation of the idea of rights was sweeping democracy along in the direction of absolutism; the current was counter to that of the Revolution, which insisted above all things on liberating the individual and maintaining in him a consciousness of his own dignity. In a melancholy conclusion, Beudant passed his adversaries

[1] Often, on the contrary, this intervention is intended to safeguard the right of the weakest individuals. When the State restricts or controls the authority of the husband and father, it guarantees the rights of the wife and child; when it limits the number of hours of labor, it safeguards rather than compromises the liberty of the workingman.

in review, acknowledged the increasing force of the attack, the feebleness of the resistance. Right and left, he found in the doctrines which he combated the same contempt of rights, the same intolerance, and the same tendency toward State omnipotence.

§ 50. *The Need of Idealism.* The events which have followed, and the painful crisis through which we have passed, have shown the dangers that lie in that weakening of the idea of rights. Many good citizens have felt the necessity of an effort to restore the spirit of equality, to enlighten public opinion, and to interest it in the defense of rights. They have realized that a democracy could not dispense with ideals, that without ideals the Republic was but a precarious régime, at the mercy of a coalition of malcontents and destined to degenerate into a dictatorship. Disquieting signs have revealed a change, a diminution, in morality. Morals, which have rested for a long time on religious beliefs, now seek another basis. Just when the law comes to recognize the right of association, we perceive, too, that association requires a basis in generous good will; it must have, at least partially, an ideal and disinterested aim. Even political parties have a certain need of idealism. Far from maintaining themselves, they tend toward self-destruction, if they become mere syndicates of interests whose object is the conquest and the sharing of power.[2]

[2] "But in any event, a great party, after having established a régime which is not easily distinguishable from the nation itself, has not the right to live on its past. It has not the right to live without ideals. It must have ideals, so that it can give to the citizens the nourishment which they cannot possibly do without. To these good and valiant men who make up these committees, who comprise the staff of the republican army, and who ask nothing better, indeed, than to spend their energy and their zeal in the public interest, in the service of a generous and noble ideal, to these nourishment must be given more substantial and wholesome and better suited to the purposes of propaganda. Across those stagnating and putrescent pools which are forming and spreading throughout the land it would be well to send a strong purifying breeze which should dissipate all the foul odors and kill the morbific germs." (Speech of M. Briand at Périgueux, PT October 12, 1909.

§ 51. *Widespread Evidences of Idealism.* At the same time a revival in new forms of religious feeling, as distinct from dogmatic faith, has taken place in our country. "If you are a believer," says Alfred Croiset in his preface to Paul Bureau's book, "you will readily recognize this religious spirit in forms which in general conceal it from the hosts of the faithful in all the positive religions. You will discover it in all these important doctrines which to-day inspire so many unbelievers; in socialism, in Solidarism, even in laïcism.[3] Wherever you find an ideal, a faith, a passionate devotion to that ideal, you will perceive germs of religious spirit. On the other hand, wherever you find a narrow practical Positivism hiding behind beliefs which are atrophied or dead, there you will have reason to denounce, and with good reason, an unconscious paganism."[4] In all the societies founded to bring together those willing spirits who are pursuing a disinterested end, who are active in behalf of truth, moral uplift, defense of the law, charity, or education, we feel a certain current of idealism. One of the best informed men in France on religious matters, Paul Sabatier, has written that in order to study the religious movement one should not only look for it in the organized churches, but must go into the people's universities, into the workingmen's syndicates and the coöperative associations.[5]

[3] [See footnote 5 in section on "Pragmatism," p.102 post.— ED.]

[4] Preface to "La Crise Morale des Temps Nouveaux," p. 6.

[5] Proofs of this are not far to seek. We will cite one instance at random. ED January 24, 1909 reports a meeting of protest against the dismissal of a certain number of workingmen following acts of syndical propagandism in the region of Épinal, and closes with this reflection: "On leaving this meeting, where we conversed at length with several of the dismissed workingmen, we could not help admiring those men who accepted their trials with courage, and who told us in a simple, unemotional manner of their firm determination to struggle on despite all discouragement, and to continue at any cost the work they had begun. And we were set to thinking that, since social conflicts seem to-day to be growing more frequent and patronal oppression more pronounced, it would be indispensable that the hearts of all militants should be

The progress of religious philosophy has so broadened our conception of religious feeling that it no longer holds as essential the existence of definitely determined and formulated beliefs, like the dogmas of a church. Faith, according to Boutroux, is born "of the feeling of distress which invades the heart of man, when he considers that contrast of greatness and wretchedness which characterizes his nature." [6] For many a man, belief in something superior to himself is a condition necessary to action, and the only means he has of making life intelligible and tolerable.

These forms of belief are essentially variable; one might find among them a complete graduated series. The first group would include all those who profess a positive religion. In most religions one encounters faith in a personal God who has revealed himself to man, and who by special intervention acts in providential and at times in miraculous ways. The churches are so many associations, differing among themselves as to dogmas and the organization of external authority, and leaving the believer a greater or less freedom in his thinking. Besides those who belong to the churches there are all those whom one may call *religious freethinkers*. Among these some believe in God and in a future life, being unwilling to admit that death puts an end to our affections, or that goodness goes unrewarded; others put aside the problem of the existence of God, but believe in justice, in duty, in the fatherland, in humanity. We should have to count also a good many who are idealists without knowing it. Let a moral or social crisis arise, one of those crucial experiences of life which reveals men

aflame with that idealism and courage which enlarge men's natures, and enable them, in spite of sufferings, to work toward the advent of a new era."

[6] *Boutroux*, "La Philosophie en France depuis 1887" (RMM 1908, p. 707).

to themselves, and that idealism appears, inspiring courage, devotion, and nobility of character. Many a man thinks himself indifferent or sceptical who, when the right moment arrives, plays the rôle of an idealist ready to sacrifice his interests, his repose, and sometimes his life, in the defense of a principle. Even though we do not behold idealism everywhere, nor indulge in any self-deception with regard to it, we can yet maintain as a fact that pure intellectualism or perfect egoism is seldom met with, for the reason that these present conditions under which life is almost an impossibility.

§ 52. *The Problem of the Basis of Duty.* We often see idealism mingled with Utilitarianism, we may find it also in the philosophical doctrines which are apparently the furthest removed from a mystical tendency. Let us take, for example, the opinions presented when the French Philosophical Society held its discussion of the present moral crisis.[7] The proposition is stated by Bureau: Contemporaneous society is passing through a moral crisis, one of the great causes of which is that the idea, the basis, the justification of duty are profoundly shaken within us. How shall we give to our democracies the moral doctrine which is necessary to their existence? Few of our opponents deny that there is such a crisis, and most of them also agree in recognizing the influence of the condition which Bureau sets forth; they debate only the range through which that condition exerts its influence. The main point on which the discussion bears is in the question whether a basis for morals must really be provided. Rauh, Lalande, and Belot look upon such an attempt as a vain, misleading, and even perilous task.

Philosophical reflection has been concentrated for centuries around this problem, and it has brought forth

[7] BSP April 1908.

nothing satisfying.[8] "From the proposition 'this is,' it would be the question of deducing a 'thou shalt.' [9] Such a contention appears to be more and more impossible and vain; it contradicts all the rules of logic. One can never bring forth a precept, a commandment, from a fact, a datum, a thing existing.[10] It is dangerous to let the moral code stand or fall with any given faith; for when this faith is shaken, when people cease to believe in the religion which upholds their particular code of morals, in the God who ordains and sanctions it, they are released at the same time from the code of morals itself." [11] And yet we do wish to try to preserve and to maintain this moral system. Lalande admits that a man who professes not to believe in a moral code is impregnable. But such a case is very rare, almost pathological. "Indeed, by bringing particular cases to the notice of such an individual (for example, by citing a judge who wittingly condemns an innocent person in order to serve a personal interest), you will be sure to rouse him to energetic affirmation or disapprobation. Then from that point you can go on, and little by little, reconstruct for this man a complete system of morals." [12] Belot believes in the efficacy of an educative solution: "You must interest a man in the things that you ask him to accept and accomplish." [13] "Why should we fear lest man, preëminently a social being, should not be interested in social concerns, and even devote himself to them, should not live morally, do his duty, expend his energy round about him with joy, or even enthusiasm.

[8] *Belot*, BSP loc. cit.

[9] [D'une proposition *ceci existe*, il s'agirait d'extraire un: *il faut faire*.]

[10] *Lalande*, BSP p. 133.

[11] *Belot*, ibid., p. 137.

[12] *Lalande*, ibid., p. 135.

[13] *Belot*, ibid., p. 139.

I truly cannot grasp so rigidly circumscribed an idea of human nature. One sees, on scrutinizing it, that the whole question is one merely of the education of individuals." [14] We may doubt the value of this empirical process, if we share the view of Parodi [15] that "in order to win men over to morality, we must furnish them with reasons; we may well be amazed if those same people who in philosophy claim the right to freedom of research, should tend in practice to rely upon instinct." But what is significant is that common attachment to morality, that feeling that morality must be preserved, even though we decline to justify it. That is the very essence of faith. Rauh recognizes this. "Faith in an ideal, in an obligation, sometimes affects man as irresistibly as does belief in natural laws. No more in the case of moral laws than of natural laws is man able to grasp any substantial transitive bond between one fact and another, that intimate mystery of creation.

§ 53. *Belief in an Ideal is Irresistible.* "So, in the one case as in the other, man has no proof of what is true except the very irresistibility of his belief. This is what Kant, following Hume, demonstrated so clearly. Why indeed should man accept irresistibility as a criterion in the one case and not in the other? He must accept as they are the various forms of his certitude, must believe that when he acts he has something *to do*, that when he contemplates nature there is a certain order in the things done, or more generally speaking, in the things themselves. His function is as much to believe as to prove." [16] We find the same idea stated at the close of Boutroux's communication to the philosophical congress at Heidelberg. "Finally, although insistently

[14] Ibid., p. 139.

[15] Ibid., p. 151.

[16] *Rauh*, "L'Expérience Morale," p. 3.

preoccupied with their respect for science and with their enrollment within its ranks, our philosophers have not ceased to devote themselves to the study and the defense of principles which can be only arbitrarily linked with scientific truths: the ideas of right and duty, of human justice, dignity, and brotherhood. Consecrated to science, they remain apostles of the ideal. They do not consent to a separation of the knowledge of what is, from the pursuit of what ought to be." [17]

§ 54. *Our Program Outlined.* We must now make a study of the principal doctrines which seem to us destined to satisfy this need of idealism: Solidarism, Pragmatism, Natural Law with Variable Content, Free Scientific Research, and Duguit's theory of objective law.

[17] *Boutroux*, "La Philosophie en France depuis 1887 (RMM November 1908, p. 714).

CHAPTER VII

SOLIDARISM

SOLIDARISM DEFINED — SOLIDARITY EXEMPLIFIED IN CHRISTIAN DOCTRINE — THE RELATION OF SOLIDARISM TO SCIENCE — EXAMPLES FOUND IN THE FIELD OF ECONOMICS — SOLIDARISM AND ETHICS — A WIDESPREAD DEMAND FOR A NEW TERM — SOLIDARITY ADVOCATED AS A LINK BETWEEN SCIENCE AND ETHICS — THE POSITION ASSAILED — CONCESSIONS BY THE SOLIDARISTS — SOLIDARISM IS OF REAL, THOUGH LIMITED, ETHICAL VALUE — A JURIDICAL BASIS CLAIMED — THE DOCTRINE OF SOCIAL QUASI-CONTRACT — GENERAL REVIEW OF SOLIDARISM — SOLIDARISM AND SOCIALISM — THE PRESENT STATUS OF SOLIDARISM.

§ 55. *Solidarism Defined.* Solidarism is a doctrine in which the idea of solidarity is taken as the principle of moral action. The idea of solidarity, which expresses union and interdependence among men, is a very old one.

§ 56. *Solidarity Exemplified in Christian Doctrine.* It is a Christian idea. According to St. Paul, we are all members of one body. "So then as through one trespass the judgment came unto all men to condemnation, even so through one act of righteousness the free gift came unto all men to justification of life. . . . For as in Adam all die, so also in Christ shall all be made alive."[1] The dogma of original sin proceeds from the imputability of punishments; the doctrine of redemption proceeds from the imputability of deserts. Similarly

[1] *Romans* v: 18, 1st *Corinthians* xv: 22.

also, in Catholicism, the Communion of Saints means that bond which unites all the members of the suffering church, the church triumphant, and the church militant. All those who have been baptized and are called to righteousness, even though they have sinned, can save themselves by their prayers, their good works, and their indulgences.

§ 57. *The Relation of Solidarism to Science.* Solidarity is an idea borrowed from science, it is the idea that serves to characterize life. "The living being, the individual, can scarcely be defined except as the solidarity of function which unites distinct parts; and death is no more than the rupture of this solidarity of the various elements which constitute the individual, elements which, henceforth dissociated, are to enter into new combinations and into new beings." [2] It is because there is no solidarity, no interdependence of parts, that there is no life in a mineral; the parts are held together only by molecular attraction. The phenomena of crystallization may be considered as a primitive, as yet obscure form of life. The same idea of solidarity completes rather than contradicts the doctrine of the struggle for existence; it is by association, by mutual assistance, that "the victory is often won." [3] In animal societies mutualism and a spirit of coöperation contribute to the progress of evolution; and the most prosperous species are those whose instincts of sociability are the most highly developed. Pasteur's discoveries showed that there is solidarity among the men of the same country from the point of view of hygiene; many diseases are social ills, and the rich who remain indifferent to the wretchedness of the poor put their own lives in jeopardy.

[2] *Charles Gide*, "L'Idée de Solidarité," p. 2. Compare *Ch. Gide* and *C. Rist*, "Histoire des Doctrines Économiques": "Les Solidaristes," pp. 671-699.

[3] *Gide*, "L'Idée de Solidarité," loc. cit.

§ 58. *Examples Found in the Field of Economics.* Solidarity is an economic idea. The economists have made us familiar with the service which men render each other by division of labor, by exchange, and by competition itself. By division of labor, each man lives by the labor of others, and in turn labors for others.[4] Through exchange, men come together and perform a mutual service, even though they have opposing interests; the same contract secures to each of its parties not only the stipulated benefit, but a gain of utility. Finally, competition, even though it partakes of the nature of strife, has nevertheless a moral value; it is that which stirs the zeal of producers and middlemen, and makes them eager to anticipate and serve the desires of their customers.

§ 59. *Solidarism and Ethics.* Several attempts have been made to carry this idea of solidarity into the domain of ethics. Among the precursors of the present movement, special mention[5] has been made of Fouillée, Henry Marion, Charles Gide, and Durkheim. Gide, in a lecture on the idea of solidarity, published in 1893 in the *Revue Générale de Sociologie*, had pointed out how fruitful this idea might be, accepted as a moral law and an economic program. This idea, conferring on men the feeling of mutual dependence, bound them to aid and relieve one another. This writer showed that progress consists in passing from the solidarity that is fatalistic and forced to the solidarity that is accepted and voluntary. For example, to hereditary succession,[6] the natural, fatalist form of solidarity, he set in opposition coöperation, the perfected form of free association,

[4] *Gide*, "L'Idée de Solidarité," p. 3. Cf. *Gide* and *Rist*, "Histoire des Doctrines," p. 675.

[5] *Bouglé*, "Le Solidarisme," p. 3.

[6] ["L'hérédité," in a sense embracing the transmission of all civil rights. — ED.]

whose motto is, Each for all and all for each. Durkheim, in his book on "La Division du Travail dans le Monde Social," likewise distinguished two forms of solidarity, the mechanical, in which individualities are submerged in larger units like the molecules which form a crystal, and the organic, in which independence of function in the various parts of the social organism, far from annihilating the individual, develops it and contributes to its progress. Henry Michel, in his book on "L'Idée de l'Etat," presented another aspect of the same idea, demonstrating, in the wake of Renouvier, that true individualism does not isolate the individual nor shut him within himself, but conceives of him as destined to live and develop as one of a group, and to become a copartner [7] of other men.

§ 60. *A Widespread Demand for a New Term.* Solidarity was given a new impulse when in 1897 Léon Bourgeois, a politician possessing an enlightened and sympathetic interest in the labors of men of thought, adopted and brought forward the idea in a little book entitled "La Solidarité." According to Bouglé, this work had the character of a manifesto. Solidarity seemed destined to become the moral viaticum of a great party, which was to draw from that idea a new store of idealism, and the inspiration for a whole new program of practical activities. The most important work of the actual régime, the organization of a laïc system of education in the elementary schools, remained compromised unless this instruction should prove capable of providing a solid moral education. Laïcism had need of a doctrine; it was conceivable that Solidarism might furnish it. The idea of solidarity, borrowed from science, would perhaps enable men to realize the long-deferred hope of finding a scientific basis for ethics, of erecting a passageway, "an

[7] [Personne solidaire.]

arch," between conscience and science. The word "solidarity" itself, with its suggestion of vagueness, would form a felicitous substitute for other words too hackneyed or too restricted in meaning to be effective. "'Justice,' distinguished from charity by long usage, and drained, so to speak, of all sensibility, gives an effect of something hard and unfeeling. 'Charity,' in the current sense of the word (which is not the original and truly Christian sense), expresses a kind of sentimental and gratuitous condescension as of a superior to an inferior. 'Fraternity' itself, which was so dear to the sentimental democracy of 1848, has the drawback of being nothing more than a sentiment, and our modern generations, eager for positive, objective knowledge, were in need of a word which should express the scientific character of the moral law. The word 'solidarity,' borrowed from biology, admirably fulfilled this obscure but profound necessity." [8] From this idea of solidarity one might finally evolve a whole program of social reforms, point the way for a party which was prepared to repudiate the old economic liberalism, and attempt to intervene for the alleviation of suffering or undeserved misery without provoking strife between classes in the effort to win economic peace through revolution. Thus Solidarism could become a great political theory, enlisting the support of many good wills and linking with the idea of justice every sort of aspiration and a complete program of reforms. Inspired by M. Bourgeois, the movement spread rapidly. Series of lectures and conferences were organized to set forth and to elucidate all the probable results of the doctrine and to extend them into new spheres, especially into education.

Let us try to see what is the foundation and what the practical bearing of this doctrine, so that we may

[8] *A. Croiset*, "Essai d'une Philosophie de la Solidarité," preface, p. x.

have a sound basis for judgment. The Solidarists have attempted to establish their doctrine on a foundation at once scientific and juridical.

§ 61. *Solidarity Advocated as a Link between Science and Ethics.* "In order to put ethics on a truly scientific basis," says Boutroux,[9] "there must be an existing fact which is capable at the same time of being observed objectively and of furnishing a norm of human conduct. Now solidarity seems precisely to unite these two conditions." And moreover it is a fact. Science teaches us that life is an association of organs, all of which assist one another and are mutually dependent. The same interdependence exists among the members of a society. In order to be born into the world, to grow up, to become educated, to learn and to practise his profession, to provide for his needs, to preserve his health, to think, to develop his mind, a man needs the help of his fellow men. He is under obligation not only to his contemporaries but to all the generations which have preceded his own, which have tilled the soil, founded and built cities, accumulated enormous reserves of material wealth, of scientific discoveries and industrial inventions, established a complete intellectual and artistic patrimony, developed and transmitted civilization. In such ways we feel indebted to others. Some of the Solidarists have held that such indebtedness gave them a solid basis of known truth on which to establish their doctrine. "Upon this truth," writes Payot,[10] "ethics is founded as upon a bed of rock." But manifold objections have arisen. We have had to recognize — and this is what Léon Bourgeois in particular has done — that the doctrine of Solidarism was not formed by a simple grafting of ethics upon science.

[9] RMM 1908, p. 695.

[10] "Cours de Morale," p. 31.

§ 62. *The Position Assailed.* Science and ethics are necessarily separate; we cannot pass from one to the other. Science gives us the explanation of phenomena, teaches us the why and wherefore of things, but does not provide us with a rule of action. We are not justified in going from "the enunciative to the normative." [11] There is no moral significance in the fact that solidarity exists in nature. Nature is indifferent; it knows neither good nor evil. If solidarity were a natural law which we were bound to obey, we should have to accept it as nature established it, without considering the justice or injustice of its consequences. Then it must follow that all the consequences of natural solidarity are equally salutary and good. Nature shows us not only beings which are helpful to each other; it shows us some living at the expense of others. In the social struggle there are the victors, the vanquished, and the parasites. The child who is handicapped by the ill effects of the disease or the vices of his parents is a victim of solidarity. If natural solidarity is to become a moral rule, the conclusion which shrewd people will draw from it is that they must contrive to make use of the services of others, and to live at their expense, in any event to keep the upper hand.

As Paul Bureau [12] has said, the ethics of solidarity teach selfishness as well as unselfishness. How many examples might be cited in support of this observation! The tax-payer who makes an honest declaration says to himself: I shall be the victim of my own honesty; every man practises deception in order to evade a part of the tax, whoever does not do so is in reality overtaxed and pays for others beside himself. The workingman who is unwilling to belong to a union safeguards his own

[11] *Lalande*, BSP April 1908, p. 133.

[12] "Crise Morale des Temps Nouveaux," p. 324.

liberty, saves time and money, and conciliates his employer; nevertheless he will benefit by the action of the others if the activity of the union, or a strike, enables him to receive an increase of wages or a decrease in the number of hours' work in a day. The manufacturer who establishes a pension fund or who lightens the labor of women and children assumes voluntarily an obligation which the law has not imposed on him, but he also plays into the hands of his competitors and thereby weighs himself down with an additional burden; made wise by his experience, he will find his zeal diminishing, will try a change of method, doing as others do, and thus yield to the law of solidarity. The professional man who buys a practice, resolving to abstain from certain abuses which are the "bonus dolus" of the profession, by that very means renders conditions unfavorable to himself and diminishes the products and the value of his practice. The functionary who wishes to pursue his career without solicitation or intrigue jeopardizes his own future and facilitates the progress of his colleagues who are not impeded by such scruples.

§ 63. *Concessions by the Solidarists.* In the objections urged against their doctrine on these two points, the Solidarists have had to admit that there is a large share of truth.

The transition from natural law to obligation takes for granted an act of volition, and this act implies a faith in justice. "When we ask ourselves," said Léon Bourgeois,[13] "what conditions human society must satisfy in order to maintain itself in a state of equilibrium, we are led to believe that the one sole prerequisite is justice." And further, in reply to Malapert: "We testify to this fact; that the need of justice exists in every conscience

[13] "Essai d'une Philosophie de la Solidarité," first lecture of *Léon Bourgeois*, on the idea of solidarity, p. 8.

and rules there imperiously. It matters little whether the notion of justice be an innate idea, a conception of some ideal existing outside the mind, or whether it be a relatively recent acquisition, or the result of a secular evolution. We take justice for granted, and it is our point of departure." [14] Exactly; but that is a very significant confession. It is an admission that it is futile to pretend to found ethics on science, and that the postulate of ethics is belief, is faith, whether rational or otherwise.

But it is not enough to set up the idea of solidarity as an end, to make it an ethical principle; we must still choose among the forms of solidarity, must retain some and reject others. This choice brings us back again to the idea of justice, which must serve as our criterion. "That solidarity which we desire to establish is such as will conform to the idea of what is just, and will make the accomplishment of justice possible." [15] We are therefore warranted in saying that the Solidarists are also idealists. "We discover in their souls all those intense feelings with which philosophical adherents of natural law have made us familiar ; these are the feelings which vibrate upon contact with fact; these the reactions which decree the reforms which Solidarism aspires to introduce.[16]

§ 64. *Solidarism is of Real, though Limited, Ethical Value.* But having made these reservations, we must concede that even if solidarity does not furnish ethics with the fixed principle, the firm foundation, that its followers may have wished to give it, it contributes at least a very important complementary element. By revealing to us what we owe to our fellows and how we

[14] Ibid., p. 27.

[15] "Essai d'une Philosophie de Solidarité," lecture of *Boutroux*, on the rôle of the idea of solidarity, p. 278.

[16] *Bouglé*, "Le Solidarisme," p. 48.

are dependent on them, it enables us better to understand our duty and helps us to accomplish it.[17] Solidarism broadens our conception of individual right. Instead of shutting the individual within his ego, instead of isolating him, of putting him constantly on the defensive toward his fellows and toward the State, it leads him to see that he cannot attain complete development except through society, that society has need of him, and is essential to his own well-being.

§ 65. *A Juridical Basis Claimed.* We have seen that the Solidarists founded their faith on law also, and sought to establish their doctrine on a juridical basis. Starting with the idea that from birth man is charged with a social debt, they tell us that in his relations to others he is in the situation of a person who has received something which he does not deserve, or who has profited by a merely lucky turn of affairs. He is bound by virtue of a quasi-contract, which means above all that he is bound without his act, and without having consented to his obligation. But how is the extent of this obligation to be determined? In whose interest will it be discharged? In principle it rests on all men; all are in varying degrees debtors to society. This obligation binds us to the generations which have preceded us and for which we can do nothing; but through a sense of justice and equity, we consider ourselves under obligation to the descendants of those who have passed out of life. "As an act of

[17] "To one for whom the thought of poverty is depressing, restrictions, measure of control, and tax exactions seem but trifling, if their object is to procure to all a minimum of subsistence and security. Such a one will accept his share of the obligations and charges of that social prevision which regards them as measures of safety for the mass of men; the tribute imposed upon the favorites of fortune will not seem to him an unjust levy, but rather a means of securing individuals against unjust loss, which exhausts energy and partially corrupts the social organism." (*Bourguin*, "Les Systèmes Socialistes" and "L'Évolution Économique," p. 355.)

good will," says Andler,[18] "let us admit that we are indebted to the future generations for all that we owe to the past." We ought not only to maintain but also to increase the social patrimony that we have received. But who shall determine the amount of that debt and be authorized to demand its execution? Society alone can do this. We are all debtors and creditors, in respect of one another; moreover, we are unequally so. Some men have been specially favored; they have reaped large benefits from an antecedent solidarity. Others have failed to receive their share and have suffered in consequence. So there must be a new apportionment, a setting aright of accounts; and no other agency than society itself can make the re-adjustment. By making demands on the privileged persons, by indemnifying those who have suffered injury, it does no more than satisfy justice. A tax for the purpose of compensating social inequalities is an act of strict justice; thus it becomes a duty for the rich to aid the poor on quite other grounds than those of charity.

§ 66. *The Doctrine of Social Quasi-Contract.* There has been no lack of objections to this conception of the social debt and of the quasi-contract. It must be admitted, indeed, that it is neither very clear, nor fully satisfying. Can we really speak of debt when none of those to whom payment is due thinks of us as under obligation to him? The men of former days worked and suffered for themselves. "The cave man," says Malapert," [19] cut and polished the stone for his own use, and not for mine." And if it be true that those of an earlier generation labored for us, or at least gave us the benefit of their industry, they have handed down burdens also, and debts that we have had to pay. We feel

[18] "Du Quasi Contrat Social," RMM, p. 527.

[19] "Essai d'une Philosophie de la Solidarité," p. 104.

oppressed by the weight of their faults, and sometimes even of their crimes. "Delicta majorum immeritus lues." And if by an effort of good will, which has ceased to be justice, we are disposed to substitute other creditors for those who can no longer require anything of us, how can this account be opened among so many men who are debtors and creditors at one and the same time? Who shall be judge of what they are to give and what they are to receive? Wealth is not the only thing to be desired; to be perfectly just we must take health and length of life into consideration. "Here is a man who has inherited a hundred thousand francs and a mental disease; make out his statement." [20] Under pretext of striking a balance, the State might be capable of anything, to the point of disregarding all the rights, or at least all the advantages, previously secured by its members. [21]

What shall be the final valuation of this idea of quasi-contract, borrowed from private law, in which field, moreover, it has never been clearly defined? Is it not, as Gény says, an abuse of logical abstraction? Perhaps there is really something factitious in the attempted adaptation. What can be maintained, however, is that the theory of the quasi-contract is founded on a principle applicable as well to public as to private law, namely, that no one should enrich himself unjustly to the detriment of another. At the same time we may call attention to the tendency of courts and some law writers to generalize this principle which the Code has not stated, and has applied only in special instances. [22]

[20] *Malapert*, loc. cit. p. 105.

[21] See *Tarde*, BAS v. 2, p. 423.

[22] See Cassation, June 15, 1892, Sirez, 1893.1.281, note of Labbé.—Cass. July 31, 1895, Sirey, 1896.1.397.—Cass. Oct. 18, 1897, Dalloz 1899.1.105. Cf. *Ripert* and *Tesseire*, "Essai d'une Théorie de l'Enrichissement sans Cause," RDC 1904, pp. 727-796. *Baudry-Lacantinerie* and *Barde*, "Obligations," 3d edit., vol. iv, pp. 502-533.

§ 67. *General Review of Solidarism.* We are now in a position to determine the salient features of the Solidarist doctrine. It is an intermediary thesis between socialism and individualism. "It is a system which occupies a position halfway up the ascent to the region of principles. Even as it holds back from the topmost heights, and indeed from all inquiry into the ultimate sources of justice, so it declines to descend so far as to the details of application. After proving the necessity for new institutions, it fails to specify in formal terms what shapes they should assume." [23]

For one thing it reacts against the errors of individualism, it endeavors to demonstrate that competition and struggle are not always means of selection; it invests the individual with a social significance; tries to attach him to his group, to make him an integral part of it. But the group is not an entity, its value is no more than that of its constituent members taken together; so society should endeavor to allow the individual to pursue his own ends while it safeguards the interests of others. "Individualism," said Bouglé, [24] "exists no longer as a means, but as an end." In other terms, the goal is still the free development of individuals, but this goal cannot be attained without the coöperation and the intervention of society. The power of individual initiative is not enough.

At the same time the Solidarists have much in common with the socialists. The grievances of the two groups against the present economic régime are at bottom very nearly the same. There cannot be just contracts without a certain equality of situation between the contracting parties. Right of contract is an illusion and an injustice when one of the parties is all-powerful

[23] *Bouglé*, "Le Solidarisme," p. 196.

[24] "Solidarisme," p. 131.

and the other defenseless. Society, then, should be authorized to intervene and reëstablish equality.

§ 68. *Solidarism and Socialism.* But if the Solidarists and the socialists can, as is admitted,[25] go hand in hand for a part of the way, is it possible to determine the point at which their paths separate? In his book on "Solidarism," Bouglé endeavors to compare and to differentiate the two tendencies. The impression which we gain from this meticulous comparison is that the point of divergence is uncertain; many distinctions that have been attempted are more apparent than real. In its beginnings Solidarism, for example, affected to ignore the State, or declined at least to have recourse to it, to increase its prerogatives or its authority. Bourgeois says,[26] in one of his exposés: "I wish to call your attention to the fact that until the present moment, neither to-day nor in our preceding discussions, have I ever pronounced the word State, and the reason for my never pronouncing it is that I have not felt the need of it. It is really unnecessary for me to point out the claims of a reality outside of us and above us, called the State, of setting up this reality before individuals, and of determining the relations which exist between it and them." Solidarity considers only the relations of individuals among themselves, but as the individuals are themselves factors in a collective life, as their rights have a social aspect, there is no longer any conflict to be feared between society and the individual. Individual rights are merged with social rights. The sole function of the State is to assure the execution of the social quasi-contract existing among men. The crisis in political science, which originates in the constant opposition of individual and State rights, is safely passed.

[25] *Renard*, "Essai d'une Philosophie de la Solidarité," p. 70.

[26] "Philosophie de la Solidarité," p. 90.

The barrier between private and public law is lowered; Andler believes even that it is disappearing.[27] And we may deliberately oppose this conception to that of socialism, which exalts the State, expects everything from it and makes the organization of labor an administrative service.

Yet if we observe more closely, we see that the difference between the consequences of the two doctrines is much less than it at first appears to be. Solidarism is essentially an interventionist doctrine, even while it guards against being so; the rôle which it assigns to the State, of sanctioning the quasi-contract, is big with consequences. Moreover, the State does not confine itself to giving its sanction; it has to determine, to specify, the credit and the debit in each person's account. This sanction of the social quasi-contract must be manifested, as Bourgeois recognizes,[28] "by an obligatory contribution from all the associates, to the unavoidable expenses incurred by the institutions which serve in the conservation of society, in the safeguarding of individual rights, and in the accomplishment of the duties of solidarity." It is precisely this contribution which may seem disquieting.[29]

§ 69. *The Present Status of Solidarism.* So Solidarism, which had in the beginning a somewhat limited program, was destined to be led to overreach its ambitions, to enlarge its field of action. However, as Bouglé reminds us,[30] the Solidarist tendencies, even when carried to the

[27] "An event has taken place which, candidly viewed, is comparable to the profoundest revolutions that have taken place in the law, and which, to our surprise, has scarcely been perceived. There is no longer any distinction between public and private law." RMM 1897, p. 521.

[28] "Philosophie de la Solidarité," p. 92.

[29] "I see a disquieting judicial retinue arrive in state. I see the judge, the bailiff, the gendarme, the revenue-officers, and I am far from being reassured." *Albert Sorel*, BAS 1903, v. ii, p. 392.

[30] Loc. cit., p. 171.

extreme, will stop short of integral socialism, at any rate of unified and revolutionary socialism. Solidarism will urge neither the suppression of private property nor strife between classes. It is true that it surrounds private ownership with restrictions imposed in the interest of society, and that it conceives a long series of transitions between individual and communal ownership.[31] It is true also that the strife between the classes draws closer the bonds of solidarity within each class, but Solidarism brings into the light all that unites men in spite of class interest. It also adheres firmly to the idea of national feeling and shows us that the great historic groupings which furnish a setting for the individual are needed to maintain the coherence and unity of law and to prevent the aggravation of social strife.[32]

We shall learn in the near future whether this Solidarist doctrine has been able to attain its goal, to serve as the ideal for a democratic party anxious to bring about reforms while there is still time. Let us hope that it may, even though we must aver that its power of expansion seems to us somewhat lessened. Finally, it advances the idea of justice; it annexes a domain which has been considered as belonging to the sphere of charity.[33] It has been reproached for being rather vague; but it is also on that very account more supple and more capable of arousing generous feelings. It errs in assuming to be a scientific moral code when in reality it is founded on a sentiment, a belief; but even that, Boutroux observes,[34] is entirely legitimate, and it is not

[31] See *Rauh*, "Proprieté Individuelle et Proprieté Solidaire dans l'Essai d'une Philosophie de la Solidarité," pp. 163ff.

[32] *Saleilles*, "Union pour la Vérité," Feb. 12, 1906, pp. 348-349.

[33] Cf. *Gide*, "Justice et Charité dans la Morale Sociale," p. 214.

[34] "Solidarity, which Solidarism erects into a dogma, is at bottom a sentiment, a belief, an aspiration. It is that sympathy which tends to come to the aid of the disinherited, and to utilize to this end the forces

by this trait that Solidarism is differentiated from other philosophies of law.

of society, since those of individuals are insufficient. It is that common desire to give over to organized society the duties of beneficence which are recognized by individuals. Whoever will give credit to Solidarism for this desire, for this faith, will find his own arguments taking shape and gaining validity. His logic is conclusive if he but recognizes its artificiality." (*Boutroux*, BAS 1903, v. 2, 405; cf. p. 407.)

CHAPTER VIII

PRAGMATISM

DERIVATION AND EXPLANATION — A MIDDLE GROUND BETWEEN THE IDEAL AND THE PRACTICAL — EXAMPLES OF PRAGMATIC METHOD — THE BROAD SCOPE OF PRAGMATISM — ITS RELATION TO VARIOUS EARLIER DOCTRINES — PRAGMATISM AND SCIENCE — BLONDEL'S THEORY — THE DEFECTS OF PRAGMATISM.

§ 70. *Derivation and Explanation.* The name Pragmatism[1] designates a method, a tendency, a program of action rather than a doctrine. The word "pragmatic," formed by derivation from πραγματικός (relating to facts) expresses what is characteristic of this attitude, the desire not to be interested in ideas for themselves, but to judge of them according to their results, their

[1] The Pragmatistic movement which has developed rather recently in England and America and made rapid progress, is represented chiefly by *William James* and *F. C. S. Schiller*. *James's* lectures on Pragmatism, delivered in Boston and New York, were published in London in 1907. "Studies in Humanism," by *Schiller*, appeared in 1908 (Macmillan, London; Paris, Alcan, trans. Jankelevitch announced 1909). An older article by *Pierce* may also be cited, "How to Make our Ideas Clear" (*Popular Science Monthly*, Jan. 1908). That part of the pragmatic conception which is peculiar to *Pierce* styles itself "pragmaticism." *Schiller*, on the other hand, calls the system "Humanism," in order to indicate that the philosophical problem must be stated and if possible solved as a problem of humanity, avoiding the a priori and the search for the absolute, and taking into account limits of experience and exigencies of life. In France, the subject of Pragmatism has stimulated in a very short time a considerable series of studies. See, in particular, *Lalande*, "Pragmatisme et Pragmaticisme" (RP 1906); *Parodi*, "Le Pragmatisme d'après MM. James et Schiller" (RMM 1908); *Boutroux*, "Science et Religion," 1908; *Marcel Hébert*, "Le Pragmatisme," 1908; *Bourdeau*, "Pragmatisme et Modernisme," 1909.

practical consequences, inasmuch as the value of a doctrine is determined by its effects.

§ 71. *A Middle Ground between the Ideal and the Practical.* Pragmatism is presented primarily as a means of reconciling the demands of idealism and of action. No man can, with impunity, think without acting or act without thinking. Whatever tends to separate thought from action is misleading, if not calamitous. The man of thought who shrinks from action, who attempts by sheer intellectual effort to solve the problems which vex mankind, and who stops to ponder all things, condemns himself to impotency and scepticism. He questions the possibility of knowledge, the existence of the exterior world, liberty, and morals. Unless he can rid himself of the obsession of his own thought, he becomes incapable of living. The man who, as the result of temperament or with deliberate intention, takes the opposite course, however, that is, of shunning all intellectual preoccupations, all problems which the mind is unable to solve, will have no happier a fate. He will find it impossible to regulate or to organize his life; he will feel at times a sense of loathing for a life so wanting in perspective and in the means of procuring any other than purely material satisfactions. A man of either type will find happiness only through the attainment of that conviction which is best adapted to the exigencies of his life, which will reassure him, encourage him, and stimulate his zeal and his hope. These are the results by which he will recognize its superiority.

§ 72. *Examples of Pragmatic Method.* In many cases, indeed, just such equilibrium is established. Both the supporters and the adversaries of the doctrine of free will conduct themselves in life as though they believed in freedom. They form projects, put them into execution, and congratulate themselves when they have

succeeded, or if they chance to fail reproach themselves for not having done all that was possible. That is the pragmatic solution of the problem of freedom.

The same method can be applied to the problems of morals and religion. "Let us suppose," said Lalande,[2] "two contradictory propositions: It is right that the wicked should be punished in the other world; and the punishment of the wicked in after life must be rejected as repugnant to our minds. Moreover, let us suppose it impossible to demonstrate one of these propositions in a way to make the other untenable. Let us leave the metaphysicians to argue among themselves, while we come to results. We will suppose that each of these two propositions, in turn, is true. It is evident, if universal belief in the first proposition be granted, that men would act otherwise than if all were united in an antagonism to punishment in the after life. It is also clear that the conduct of those who believed in such punishment would be decidedly more correct than that of those who did not believe in it at all; whence it follows that *the first proposition, since it is good in its effects, is true.*" In fact, William James gives no other reasons to justify his faith in the power of human action, in the future life, and in the certainty of salvation. "The only real reason I can think of why anything should ever come is that *someone wishes it to be here.* It is *demanded*—demanded, it may be, to give relief to no matter how small a fraction of the world's mass. This is *living reason*, and compared with it material causes and logical necessities are spectral things." [3]

§ 73. *The Broad Scope of Pragmatism.* Thus every man can seek and find at will the conviction or the belief best adapted to the needs of his life and thought. Hence

[2] RP 1906, v. i, p. 141.

[3] 8th lecture, cited by *Parodi*, RMM 1908, p. 100.

the variety of forms and aspects of Pragmatism, which an Italian Pragmatist, Papini,[4] likens to the corridor in a great mansion, opening into a hundred chambers. In one of these chambers there is a man kneeling on a prayer-stool, in another a scientist is working in his laboratory, in still another a metaphysician sits rapt in contemplation. These various chambers are so many varieties of Pragmatism; they are separate, but they communicate with one another and all open into the same corridor; and all those who dwell within those chambers find the same shelter, and the same security.

§ 74. *Its Relation to Various Earlier Doctrines.* Pragmatism brings to its adepts not only a variety of possible solutions; it assumes at the same time to develop and to reconcile some very old doctrines. "A new name for some old ways of thinking," is the sub-title which William James gives to his book. We may liken Pragmatism to a crossroads, where all of these doctrines meet, each one constituting an avenue of approach. Thus Pragmatism serves as a continuation, an extension, of empiricism, Utilitarianism, Positivism, Kantianism, voluntarism, and fideism.[5] To judge a doctrine by its fruits is to act empirically, is to let experience prevail over reasoning. To consider as truest and best whatever doctrine conforms the most nearly to our needs, is to carry

[4] To tell the truth, the Italian disciples of *James*, *Giovanni Papini* and *Prezzolini*, have considerably changed the aspect of Pragmatism by an admixture of fancy and dilettantism. See *Bourdeau*, pp. 30 and 85.

[5] ["Fideism" and "laïcism" (pp. 76, 85 ante) have the right to be regarded as something better than neologisms. "Fideism," though the word does not occur in the Oxford and Century dictionaries, is treated by the editors of the Catholic Encyclopædia as sufficiently significant to have an article devoted to it. "Laïcism," which may be considered an admissible derivative of the English words "laïc," "laïcize," denotes a movement for whose recent developments the reader may be referred to the article on "Laïcization" in the same work. — ED.]

Utilitarianism to its furthest extreme. From Positivism, Pragmatism borrows its conception of science; to know that in order that we may foresee, to foresee in order that we may perform. It borrows from the same source a disdain for metaphysics and pure intellectualism. Kant, in his turn, is looked upon as a forerunner of Pragmatism, through his conception of the primacy of the practical reason. The pure reason is powerless; the practical reason to which Kant entrusts himself for guidance is no other than a form of Pragmatism. The Pragmatists profess to have a claim also on Schopenhauer, although his pessimism ill accords with the essential datum of their thesis. He belongs to them, however, at least by reason of the importance which he assigns to the rôle of the will, to the influence which it exercises on the intelligence and on society. Finally, Pragmatism includes a goodly share of the fideism of Pascal: the heart has its reasons which the mind does not know; we must make good men desire religion to be true. It is proper to recall, however, that Pascal added,[6] "and then show them that it is true."

§ 75. *Pragmatism and Science.* Finally, Pragmatism makes skillful use of the present tendencies of scientific philosophy. The sciences are based on a certain number of principles and more or less arbitrary conventions, doubtless suggested, but not dictated, by experience. The scientist borrows from reality whatever perceptions it has to give him, but he makes a choice among these perceptions; he eliminates some and retains others. It is the savant, according to Leroy, who makes scientific facts, or, if you prefer, who makes veritable scientific

[6] We must begin by showing that religion is not at all opposed to reason, next that it is worthy of veneration; then we must arouse a respect for it, next make it appear pleasing, make good men want it to be true; and then show that it is true." ("Pensées," ed. *Havet*, art. xxiv, 26.)

facts.[7] "Science," he says also, "tends toward the useful rather than the true; it grasps only the utilizable part of truth."[8]

§ 76. *Blondel's Theory.* The tendencies of religious philosophy are also comparable with those of Pragmatism. Thus Maurice Blondel's thesis on "Action," by which he has attracted so much notice, may be regarded as a form of Pragmatism. Curiously enough, Blondel had chosen the name "Pragmatism" to characterize his doctrine without having seen it previously, in the belief that he had originated the word. This is not saying that the two doctrines are identical; but they at least reach the same end. Blondel is a Pragmatist to the extent of justifying the existence of the supernatural by its necessity, and holding it to be one of the conditions of action. Man, in his actions, exceeds the data of experience; in order to satisfy his own needs or to keep a balance between desire and the power to achieve, he must believe in something which is greater than himself; and that belief is an act of religious faith.[9]

§ 77. *The Defects of Pragmatism.* If it is hard to repudiate Pragmatism entirely, it also seems impossible to accept it in its entirety. We are all Pragmatists, more or less, when we attempt to form an opinion for ourselves that will be compatible with the end and the conditions of action. But we go to an extreme if we attempt to free ourselves from the control of the reason. We but deceive ourselves if we confuse the true with

[7] "Dogma et Critique," p. 334.

[8] Ibid., p. 333.

[9] It would not be hard to discover the influence of Pragmatism in numerous other doctrines. *Taine*, as *Bourdeau* says (p. 45), conforms to the pragmatic method when he points out the effects of hereditary bias and the social benefits of Christianity. (See also the discussion of the analogy of *Bergson's* philosophy to the Pragmatist doctrines in *Bourdeau's* "Pragmatisme et Modernisme," pp. 153 and 199.)

the useful. If we must believe in the objective import of truth before we can think or act, "we may find," to quote Parodi, "that it is pragmatically impossible for us to limit ourselves to Pragmatism." [10]

[10] RMM January 1908, p. 112.

CHAPTER IX

NATURAL LAW WITH VARIABLE CONTENT

COMPARISON OF OLD AND NEW VIEWS — ATTITUDE OF THE HISTORICAL SCHOOL — ESSENTIAL LIMITATIONS OF THE DOCTRINE OF NATURAL LAW — THE RELATIVITY OF NATURAL LAW — A NEW INTERPRETATION — EVOLUTION IN THE LAW OF CONTRACT.

§ 78. *Comparison of Old and New Views.* Even if it be true that we are returning in this present day to the conceptions of natural law, yet these conceptions differ notably from those which were commonly accepted in an earlier period. Natural law, as the old school conceived it, was universal, immutable; for all questions of positive law, it offered an ideal solution, satisfying in every respect; and the human reason could and should find this solution. There were, so to speak, two parallel systems of law which were constantly being compared, positive law on the one hand and natural law on the other. Positive law was the contingent, imperfect system; natural law, the ideal and absolute. The first tended inevitably to approach, to merge into, the second. "Natural law," says Oudot,[1] "embraces those rules which we should like to see transformed immediately into positive laws."

§ 79. *Attitude of the Historical School.* Of course the historical school made short work of such claims. It pointed out how institutions are formed and how modified, under what influences these modifications oper-

[1] "Premiers Essais de Philosophie du Droit," p. 67.

ate, and to what needs they correspond. Every law is adapted to a definite social and moral state, in relation to which, it is declared, each particular law is in a sense the best possible. For example, the question of freedom of testamentary disposition does not arise in a society which practises family co-ownership; such freedom would seem essentially unjust, because it would inevitably have the effect to despoil and disorganize the family. If we are to understand it and permit its existence, we must presuppose a régime of free individual ownership.

Thus it is not only the positive system of law that varies; it is also the so-called ideal system, which is itself contingent and arbitrary, bound to undergo the influence of its time, of its environment, and of individual characters. "The founders use this phrase" (natural law), says Bentham,[2] "as if there were a code of natural laws; they appeal to these laws, they cite them, they literally oppose them to the laws of the legislators, and they do not perceive that these natural laws are of their own invention."

§ 80. *Essential Limitations of the Doctrine of Natural Law.* If certain representatives of the school of natural law[3] still tend to confuse the art of legislation and the philosophy of law, others[4] make a clear-cut distinction between the two, and willingly concede that natural law does not furnish ready remedies and solutions for all problems. What they do demand of it is orientation, direction in matters of procedure for example; they demand a principle whose object shall be to safeguard the right of self-defense, the freedom of witnesses, the

[2] "Principes de la Législation," chap. xiii, Brussels edition, 1840, v. 1, p. 46. [Cf. footnote 7, p. 503 post.— Ed.]

[3] *Franck*, "Philosophie du Droit Civil"; *Beaussire*, "Les Principes du Droit."

[4] *Boistel*, "Philosophie du Droit," v. i, p. 2; *Beudant*, "Individu et État," p. 36.

impartiality of the judge; but details of procedure are by nature contingent. For all this regulation, the legislator keeps in mind the various elements at his command, trying to base upon them the best possible conclusion; he has recourse to the method of observation, he proceeds by research, he consults statistics; all previous experiences are taken into consideration.

§ 81. *The Relativity of Natural Law.* We must likewise acknowledge, although with some reservations, that the direction given by natural law, instead of being always constant, is somewhat variable. Indeed, the same thing may be said of the juridical ideal as has been said of the moral. "The moral code is absolute, and founded on the idea of perfection, only in its *form*; in content it is relative, with a tendency toward a perfect future realization of its ideal."[5] The desire to reconcile the juridical ideal with the laws of nature implies a variable element, due to the complexity of human nature, which holds up before our aspirations certain desiderata, such various qualities as pleasure, courage, intelligence, goodness, and devotion. Such and such an element may appear predominant, and will therefore modify our conceptions. Many transformations have been wrought in the idea of penal justice, at first confused with the idea that the severity of vengeance should equal the crime, modified gradually by consideration of the motive and circumstances of the deed, and by taking into account accident and legitimate self-defense.[6] "In the field of private law," says Labbé,[7] "where the Roman system placed matters of obligation on a basis of such apparent firmness, we see to-day new conceptions being brought into view. In the making of a

[5] *Bernès*, "Morale," p. 12.

[6] *Labbé*, "Préface du Droit Romain de Cuq," p. ii.

[7] Ibid., p. xiv.

contract, the will of the creditor at first appeared to be the chief element, especially in the stipulation. The stipulator fixed upon the thing which it was to be his right to demand, and the compliance of the debtor completed and perfected the obligation. Next, the two parties were on an equal footing in contracts resting on mere consent; the meeting of wills, in whatever order they were declared, made fast the legal knot. An already famous project of law continues the evolution. The will of the debtor tends to predominate among the elements which constitute the source of the obligation. If, in order to receive the benefit of it, the creditor puts in a timely appearance, no more is required of him. These three successive forms have satisfied the same demand for justice. Evolution is everywhere apparent as the method and the agent of progress."

§ 82. *A New Interpretation.* Similarly we see to-day new principles of interpretation either replacing those formerly in operation or taking a place beside them. Thus many acts of injury formerly regarded with indifference by the social power are to-day thought to demand reparation. Indeed this reparation can be claimed on a twofold basis. Either the author of the wrongful act is called to account for the part he has taken, and is declared responsible; or, without any fixing of responsibility, it is held just that such a person take upon himself a part or all of the risks. In the first case, the question is one of fault; in the second, one of risk. On the subject of responsibility, the law formulates a very general principle; in the matter of risks, it confines itself to apportioning the risks among a given number of cases. For the settlement of cases outside this number, the interpreters seek to discover and to make known the principle by which they should be

guided. A new conception is taking its place beside the old, without supplanting it; we shall have to learn to take into account both the old conception and the new.[8]

§ 83. *Evolution in the Law of Contract.* The principle that the contract constitutes the law governing those who are party to it has undergone manifest development. It insures respect for the word passed, to find the origin of the engagement in agreement of intention. Yet this principle has been left far behind. There is now a tendency to consider no contract worthy of respect unless the parties to it are in relations not only of liberty, but also of equality. If one of the parties be without defense or resources, compelled to comply with the demands of the other, the result is a suppression of true freedom. Hence the increasing number of restrictions upon the principle that the law simply validates the agreement. The formula "any agreement to the contrary notwithstanding" seems to be coming generally into vogue in labor legislation. The application of the theory of the misuse of individual rights, the extension of the powers of the judge, the right conferred upon him by articles 133 and 138 of the German Civil Code,[9] weaken the old principle and diminish its rigor. Thus has the notion of contract made progress, in private law. The conception of individual right has been broadened; society and the individual have a clearer consciousness of what each owes to the other.

[8] Cf. *Marc Desserteaux*, "Des Accidents du Travail que Donnent Droit à Plusieurs Indemnités," introduction, p. 2.

[9] "133. In interpreting a declaration the actual intention is to be ascertained and the literal sense of the expression is not to be adhered to.

"138. A transaction in violation of good morals is void. Void in particular is a transaction by which one, in taking advantage of the distress, light-headedness, or inexperience of another, obtains for some consideration to himself or to a third party any profits or the promise of the same, which so exceed the value of the consideration that according to the circumstances the profits are in striking disproportion to the consideration." (Loewy's translation.)

Thus, natural law is not incompatible with the law of evolution; it should not attempt "to embody positive and definitive ideas in its assertions and conclusions." [10] To use Stammler's [11] very expressive phrase, it has, inevitably, a "variable content" (ein Naturrecht mit wechselndem Inhalt).[12]

[10] *Labbé*, "Préface du Droit Romain de Cuq," p. 13.

[11] *Stammler*, "L'Économie Social et le Droit d'après la Conception Historique Matérialiste," p. 685. Cf. *Saleilles*, RDC 1902, p. 97.

[12] "The invariable fact," says *Saleilles*, "is that there is a justice which must be made to prevail in the world; it is the feeling that we owe to all men a respect for their rights, as measured by social justice and social order. But what shall be this measure, this justice, this order? No one can tell a priori. The solution of all these questions depends on the social facts with which these rights come into contact; and these facts vary; they undergo a constant development and transformation. But it depends also on our conceptions of justice, of order, of the authority and freedom of social and individual rights, of the relative preponderance which must be established in the incessant conflict among these opposed forces; and this proportion also is subject to variation and change. According to the disorders caused by the preponderance of one force or another, the factors may need to be reversed. Our conception of the social order is thereby changed, and a counter-blow dealt to our idea of social justice." (Loc. cit., p. 98.)

CHAPTER X

FREE SCIENTIFIC RESEARCH

TRADITIONAL METHODS OF INTERPRETATION — GÉNY'S PROJECT OUTLINED — THE INTERPRETER'S PRIVILEGE — BOTH PURE AND PRACTICAL REASON ARE REQUISITE — SUBJECTIVITY NOT AN ESSENTIAL CHARACTERISTIC OF THE PRINCIPLES OF JUSTICE — THE USES OF ANALOGY — GÉNY'S OBJECTIVE METHOD — LIMITATIONS UPON THE INTERPRETER — POSITIVE PRINCIPLES OF FREE RESEARCH — GÉNY'S POSITION CONSIDERED.

§ 84. *Traditional Methods of Interpretation.* "Free scientific research" is the means by which Gény proposes that legal idealism may directly influence the interpretation of law. In his important and well-known works — his study of the method of interpretation in positive private law,[1] and his discourse on the conception of positive law just prior to the 1900s, Gény shows how the force of natural law had in a way spent itself in the culminating act of codification. The idea of a right conceived by reason leads logically to the rule of formal law, to an exaggeration of the element of legality. Formal law is reason formulated and sovereign; it can and it should foresee and decide all things, and the sole function of the judge is to make certain that it is applied. According to the dominant thought at the time of the Revolution, the reign of formal law was to abolish all difficulties of

[1] "Méthode d'Interprétation et Sources en Droit Privé Positif," 1899. [This important book, so widely discussed in all Continental countries, will shortly go into a second edition; the first edition being long out of print. A chapter from it will appear in vol. ix of the present Series.—ED.]

interpretation. Commentaries served only to revive the despicable art of chicane; good sense and willingness to respect the law could and should serve every purpose. You will recall Napoleon's irritated surprise at the appearance of Toullier's first commentary and the remark which he is said to have made. It is true that not all of his advisers shared his sentiment; most of them believed that even with codification completed, juridical interpretation was still needful, and that it should be expressed with some degree of liberty.[2] The first commentators upon the Code, Merlin, Proudhon, Duranton, Toullier, and Duvergier, were of the same mind.

But when we come to the second half of the century, we find the critics confining themselves to a study of the Code, and applying to it the method of interpretation described by Gény. This proceeds from the idea that positive law must furnish every necessary juridicial solution. The legislator is to be credited with having foreseen and settled all things; if the text does not contain a specific solution for every difficulty which may present itself, it at least embodies a principle by the aid of which all difficulties may be solved. The interpreter needs only to discover this principle, and from it to deduce its consequences — consequences which are derived logically from the law itself. This traditional method has its incontestable advantages. It magnifies the interpreter by making him the mouthpiece of the law; it satisfies the demands of our classical spirit, and it seems to impart great solidity to our legal doctrine. But over against the advantages, we must take note of the difficulties. We are bound as with chains to the birth hour of the law. The law, regarded as sufficient to itself, is isolated among the sciences, and loses all touch with

[2] "A host of things are necessarily left to be controlled by usage, to be shaped by well informed men, to be arbitrated by judges." ("Discours Préliminaire sur le Projet de Code Civil." *Fenet*, v. 1, p. 476.)

life. The interpreter's respect for texts is only a vain appearance, for he himself actually creates the principles which, in order to gain for them a semblance of authority, he ascribes to the legislators. These so-called principles, which are nothing but subjective conceptions, become tyrannical in the end; they stand in the way of knowledge and they impede progress. For example, the principle is laid down that every right implies a subject who is of necessity a civil or moral person. This precludes the possibility of rights for one who is not yet conceived when the right comes into being; cases in which the law guarantees the right of an unborn person must therefore be considered exceptional and not properly to be multiplied. Thus, life insurance in favor of unborn heirs, a benefit destined for a moral being not yet recognized, becomes impossible.

§ 85. *Gény's Project Outlined.* After having denounced the abuses of the traditional method, Gény studies at length the theory of the sources of the law, and endeavors to establish a new method of interpretation.

First of all, the duty of the interpreter is to apply the statute. But how shall he interpret it? As one interprets any human volition expressed in a written instrument. The content of this instrument is to be determined according to the formula in which it is expressed; Gény repudiates in general every system which inclines to interpret the law according to the exigencies of the issue to which it is immediately applied. That system which separates the text from the legislator's thought, giving it an independent existence, subject to the law of evolution and subordinate to its social environment, substitutes the interpreter's purpose for that of the law, and sacrifices the very essence of the law, namely the deliberate, conscious will of the legislator, the meaning of which is fixed when this will is formulated. The

interpreter therefore may not give to the provisions of the law a broader scope than was intended by those who drew them up.

§ 86. *The Interpreter's Privilege.* Concerning any question remaining outside the previsions of the law, one must first inquire whether recourse may not be had to other sources — to custom, to tradition, to jurisprudential or doctrinal authority. Gény does not ascribe an equal importance to all of these sources. He determines their force and their respective importance, and the consequent degree of freedom which the interpreter may exercise. This freedom is, in fact, unlimited, whenever the case in point is outside the expected scope of the law. The interpreter must then find the solution for himself; he must seek it *freely and scientifically*; freely because he is not constrained by any external influence, scientifically because such research must not be arbitrary. "It is a question of establishing by a scientific process, a kind of common law, general in its nature and subsidiary in its function, which supplements the deficiencies of the formal sources, and directs the whole movement of the juristic life." [3] Upon what foundations must this edifice be laid? Upon the data of reason and of conscience; upon the sciences auxiliary to the law; and upon an observation of the social life, which reveals to us what Gény calls "the nature of positive things." [4] Juridical organization purposes in fact to realize in the life of humanity an ideal of justice and utility, "meaning by utility that which the general opinion regards as the greatest good of the greatest number." [5]

§ 87. *Both Pure and Practical Reason are Requisite.* Our ideal of justice is given to us by conscience; according

[3] *Gény*, "Méthode d'Interprétation," p. 470.
[4] Ibid., p. 472.
[5] Ibid., p. 471.

to Gény, it is an intuition of reason. He stands in no fear of exposing himself to the reproach of a return to natural law, so discredited by the historical school. He sees in this discredit nothing more than an excess of reaction against a doctrine which could not be sustained in the absolute form which it had assumed.[6] That natural law is universal, always identical with itself and capable of satisfying with its abstract principles the most exacting demands of the social life, is a contention which cannot be successfully maintained. Nor does Gény appear to avoid the concession that this ideal is merely belief; what, indeed, is an intuition of reason, if not belief? "If we fix our attention less upon words and more upon things, must we not say that complete truth, the necessary object of our researches, is attained sometimes by processes which lead to the stronger, more irresistible form of conviction which we call science, and sometimes by a path less clear, but perhaps no less certain in its issues, which leads us to what we commonly call belief? We may admit that the intellect finds less profound satisfaction in belief; that pure reason is capable of attaining to it only by the aid of feeling; or, more exactly, that it is obliged so to modify its normal course of operation as to leave the larger share to that form of its activity which is called the moral consciousness; we may recognize this fact without consenting that a science so completely devoted to the practical as ours is, may banish from its horizon all the products of belief. In short, practical reason must remain for us the complement of pure reason." [7] We find in this idea of the law, as set forth by Gény, a mild, attenuated form of Kantianism, in which feeling mingles with reason to form belief.

[6] Ibid., p. 477.

[7] Ibid., p. 479.

§ 88. *Subjectivity Not an Essential Characteristic of the Principles of Justice.* If the principles of justice are revealed to us by conscience, then it is within ourselves that we shall find them. Does it follow that they have, as the German school would say, a purely subjective character? Gény does not think so. He sees in these concepts "the representation of a higher reality existing outside ourselves." [8] They are not, indeed, purely individual, different in each one of us; they have a character of universality which belongs to their objective existence. We can only concede that, in passing through the individual mind, they are impregnated with subjectivity, and so seem to lose "their appearance of entities superior to man and independent of him." [9]

§ 89. *The Uses of Analogy.* If the principles of justice revealed by reason and conscience serve as a foundation for free research, they can furnish only guidance instead of a precise solution, to the interpreter compelled to supplement the deficiencies in the formal sources of the law. He must come into touch with reality; he

[8] Ibid., p. 486.

[9] Ibid., p. 486. In analyzing the conception of justice, *Gény* is led to inquire into the meaning of the sense of equity, and to ask what rôle should be assigned to this feeling in the interpretation of positive law. Unless we are mistaken, equity is for *Gény* nothing else than the sense of what is just, sharpened by juristic education. "It is a kind of instinct which, without appealing to the reasoning mind, goes of its own accord straight to the best solution, the one most conformable to the aim of all juridical organization" (p. 488). It is neither possible nor legitimate to deny that equity holds a position of authority. It is a fact of experience that in a large number of cases it leads us to the right solution more surely and more quickly than reasoning could do. Certain theories, that of the conflict of old and new laws, for example, can be made clear only in the light of equity; all of the distinctions which are based on a rational principle cannot furnish satisfactory solutions. But the interpreter, to avoid all danger of the arbitrary, should as far as possible analyze the situation in itself, putting to one side individual circumstances peculiar to the case (personal qualities, the effects of the decision), unless the law should leave the case to equity as already explained (e.g. arts. 1854, 1780, French Civil Code, modified by the Law of December 27, 1890).

must bring his investigation to bear on what Gény calls the *nature of positive things*. This expression, which is not clearly defined, seems to embrace the sum total of social relations, and of the aims which these relations imply. The positive law which regulates these relations itself constitutes a reality; in other words, the interpreter should be able to find in the solutions of the texts elements of solution applicable to cases which the law has not foreseen. This extension of legal interpretation is effected by the aid of the familiar process of analogy. This process consists in deducing a solution from the similitude established between two situations. A given situation is comparable to another which is regulated by the law; it will be admitted that the former will be regulated in the same way. Analogy is an extremely fruitful process.[10] It sometimes extends the application of a decision from one case to another: this is what the Germans call analogy of enactment (Gesetzanalogie); it sometimes deduces from scattered provisions a general rule which furnishes an entire series of solutions: this is what is called analogy of rights (Rechtsanalogie).[11]

[10] It is proper to observe that *Gény*, who assigns to analogy an important place in free research, declines to consider it as a process of legal interpretation. Nor is the question merely one of words. Analogy, considered as a process of juridical elaboration, has no such purpose as to attribute to the legislator an intention which he may very well never have had. In generalizing from solutions contained in the texts, the interpreter is inspired not by the supposed thought of the legislator, but by moral, political, economic, and social considerations which unfold these solutions. Moreover, analogy, regarded as a process of legal interpretation, for the very reason that it assumes to take into account the will of the legislator, has an undue influence on the mind of the interpreter; while in independent research there is nothing imperative.

[11] Is not this a roundabout return to the use of the same juristic construction the abuse of which *Gény* has denounced? He denies that he himself has incurred this reproach, still maintaining that analogy as he conceives it is the work of the interpreter; it rests upon interpretation; in contrast to juristic construction, it does not attribute a hypothetical intention to the legislator ("Méthode d'Interprétation," p. 502).

§ 90. *Gény's Objective Method.* From analogy Gény passes by an almost insensible transition to truly objective methods of interpretation.[12] Indeed, the analogy of rights, seeking as it does to disengage the spirit of legal solutions, derives but slight support from positive private law; only another step is necessary to give to the whole legal system the appearance of an element in our civilization of a kind to suggest juridical solutions. Properly speaking, this is no longer analogy; it is a vast synthesis of legal solutions which has been called the philosophy of positive law.[13] It is not only the ensemble of an existing body of law which must be consulted; we must seek suggestions and inspiration in all the social and even the technical sciences. Law thus allies itself with all the other sciences and ceases to be so inferior an art as that of discussing and expounding texts. Saleilles[14] echoed Gény's thought when he said, "The law presupposes general science." Thus the problem of legislation regarding pit-coal is the working up of the data of political economy and of engineering science. To find the solution which will best reconcile the ends of justice and those of utility, precedents must be taken into account and judgments must be formed concerning the results of experiments made for mines and for railroads. It may be objected, indeed, that the question is one of legislation only, but with freedom of scientific research, the rôles of interpreter and legislator converge, since when the law is silent, the interpreter must

[12] "Méthode d'Interprétation," p. 507.

[13] This is the method of argument when, for example, to settle a question as to the validity of alienations agreed to by the heir apparent, inquiry is made whether, in the general body of our law, preservation of credit is not superior to conservation of the right of property. (Cf. Cass. Civ., Jan. 26, 1897, Pand. P. 1901.1.209, and RCL, "Examen de Jurisprudence," 1902, p. 16.)

[14] "Les Méthodes d'Enseignement du Droit et l'Éducation Intellectuelle de la Jeunesse," p. 7.

speak, inspired by the considerations which would prescribe to the legislator the "lex ferenda."

§ 91. *Limitations upon the Interpreter.* Nevertheless, we must not conclude that the interpreter is invested with unlimited power. He may intervene only to supplement the formal authorities, and even in that field there are limits to his discretion in establishing rules of law. He may neither restrict the scope of the general principles of our juridical organization, explicitly or implicitly sanctioned, [15] nor may he lay down detailed regulations governing the exercise of given rights, by introducing delays, formalities, or rules of publicity.[16]

§ 92. *Positive Principles of Free Research.* But it is not enough merely to indicate what free research may not do. To make evident the functioning of its method and to permit a due appreciation of its results, it is necessary to show what it may do by applying it to a certain number of juridical problems. Gény postpones some attempts at adaptation to a later monograph. In his book he confines himself to a few general observations. Free research, like the art of legislation, uses and combines three principles: the principle of autonomy of the will, that of the public order, and that of an equili-

[15] It is for this reason, observes *Gény*, that the Court of Cassation has refused to approve the practice of judicial sequestrations and liquidations followed in certain tribunals, and intended to make up for the lack of organization in insolvency proceedings. It is certainly a useful means of settlement. It dispossesses the debtor at a time when his management may become dangerous; it substitutes a joint process of recovery for individual suits; and it takes care that the creditors shall be known, and paid in equal ratio. Nevertheless the Court of Cassation has not believed itself authorized to permit this procedure, which paralyzes the right of the owner to dispose freely of his property, and interposes obstacles to the exercise of the creditor's individual right of action. (Cass. Nov. 13, 1889. S. 1890.1.8. Cf. RCL 1891, p. 79.)

[16] *Gény* admits, however, that the courts may aid in establishing as a customary rule a usage of permitting certain delays, and they have done this in respect to the transfer of business assets. They may even go so far as to create a rule, provided this is very simple. (See *Gény*, RCL 1899, p. 461.)

brium of interests. The first principle, the autonomy of the will, appears to Gény more fertile than is commonly supposed. Free research can, in many cases, draw inspiration from it, as for example in providing for a transfer of obligations concerning which the statutory provision is silent, but which it does not forbid; in creating substantial rights sui generis on the sole condition of respecting the principles of our social organization[17]; or in settling the question as to the conditions under which a voluntary act may give rise to an obligation.[18] The principle of autonomy of the will is not only limited by that of the public welfare; it is also subordinate to the principle of an equilibrium of interests, which Gény formulates as follows:[19] "Seek to solve juridical questions, which all rest back upon a conflict of interests, by an exact appreciation and a judicious comparison of the interests involved, with a view to an equilibration conformable to social ends." This principle has been the guide of the law-maker in very many cases,[20] and in the absence of formal prescription it should guide the interpreter also. By applying it judiciously we may decide, in respect to disputed hypotheses, as to the party upon whom the burden of proof should rest, may give precision to the theory of the misuse of individual rights by comparing the importance of a right and that

[17] See, upon the nature of the rights resulting from certain exemption clauses stipulated by concessionary mining companies with respect to damages which their operations might cause to lands sold by them, Cass., Dec. 12, 1899. S., 1901.1.497, note by *Tissier*; Pand. P. 1900. 1.241, note by *Gény*; *Gény*, RB, 1897, v. vii, p. 151.

[18] For an answer to this question, *Gény* thinks that the important thing is not so much to learn under what conditions a meeting of wills may arise, as under what general circumstances voluntary agreements may acquire legal force (p. 532). This consideration does not lead him to validate indiscriminately all unilateral promises, but only those which answer to some desirable social end.

[19] "Méthode d'Interprétation," p. 542.

[20] See those cited by *Gény*, loc. cit., p. 450.

of the interests with which it conflicts. [21] Gény believes also that the great difficulties to which the extension of civil responsibility gives rise might be solved in the same way. In the silence of the statute, which recognizes only responsibility for fault, it is for the interpreter to regulate as best he may, according to the demands of justice and the moral sentiment, everything which may properly be regarded as a matter of risk. [22] From this long but nevertheless very inadequate summary of the ideas of Gény, we must seek to disengage a conclusion.

§ 93. *Gény's Position Considered.* His book is above all frank, and denounces very forcibly the errors and excesses of the traditional method, the element of fiction in its composition. No one can believe in this day that the written law is all-sufficing, no one will overlook the necessity of guarding against the logical element which misleads the jurist, depriving him of his sense of reality, of his feeling for the just and the unjust—against that abuse of technical construction which becomes in the end a kind of "idolum fori," upon which finally the legislator himself dares not lay his hand.

Without attempting to disguise the evil consequences of these interpretative processes, we should nevertheless observe that [23] these inconveniences have been tempered and attenuated by the moderation and the spirit of equity with which they have commonly been applied. On the other hand, it must be confessed that the dangers of liberal adaptation, of free research, are not less formidable or less difficult to avoid. That the law should be applied with liberality and with humanity, that its text should be adapted as far as possible to the exigencies

[21] *Gény*, p. 544.

[22] Ibid., p. 547.

[23] *Tissier*, Analysis of *Gény*'s book, RB, separate edition, p. 18. *Chausse* and *Charmont*, "Les Interprètes du Code Civil": "Livre du Centenaire," v. i, p. 135.

of modern life, that in determining the bearing of a text the judge should take into account the modifications demanded by later laws, the changes in the general body of legislation, may well be admitted. But it must nevertheless not be forgotten that the law is above all an expression of declared will. What security could there be in the legal system of a country whose judges, under pretext of recognizing insensible changes in the law, "should claim the right of attributing to such and such an article the meaning which it would have if it had been drawn up by them?" [24]

Free research involves undoubtedly less of fiction, less of artifice; but on the other hand it is open to the reproach [25] that it does not integrate juridical decisions with the whole organized body of law, weaving them into the prearranged woof of the legal tissue. The decision of a judge who acts as a law-maker will always appear individual, arbitrary, and partial; it can never have the weight of law.

If the traditional method exaggerates the rôle of logic, free research does not allow it its due share. Logic has always been in fact an agent of integration, a means of harmonizing, of unifying all the parts of the juridical organism. As Meynial says, [26] in his study of "Le Rôle de la Logique dans la Formation Scientifique du Droit,"

[24] *Alfred Martin*, "Observations sur les Pouvoirs Attribués au Juge par le Code Civil Suisse," p. 16. Cf. *Tissier*, loc. cit., p. 15.

[25] "If I were to discuss the subject, I should perhaps have to inquire whether in the present stage of our civilization, a factor in the form of a doctrine or custom could give to a right originally subjective the objective form necessary to its inclusion within the framework of our juridical structure. Even from the standpoint of the laws of sociology it might appear as a characteristic and necessary part of a given law that it should be connected with a systematic codification which, whether derived from interpretation, from doctrine, or from judicial decisions, should give it the stamp necessary to the public security." (*Saleilles*, preface to *Gény's* book, pp. xi and xii.)

[26] Extract from RMM, p. 24.

"The human mind is so constructed that it submits only to that which is orderly and without inherent contradictions. The law cannot evade this condition; it satisfies us only when it conforms to the general demand for order and harmony made by us all. To prevail with us it must be a product of reason, invested with the necessary character of logical truth; and all of its parts must appear to be bound together by relations of cause and effect. Without this, we no longer recognize it as superior to ourselves; and we are disposed to deny its right of command."

CHAPTER XI

DUGUIT'S THEORY OF OBJECTIVE LAW

OUTLINE OF THE DOCTRINE — DUGUIT AND THE SOLIDARISTS — RELATIONS TO PREDECESSORS AND CONTEMPORARIES — SOLIDARISM FURNISHES BUT A WEAK FOUNDATION — OBJECTIVE AND SUBJECTIVE LAW — DUGUIT AN UNCONSCIOUS IDEALIST.

§ 94. *Outline of the Doctrine.* Among the doctrines which recall us to legal idealism, how can we include the theories of Duguit? Unquestionably they are above all else realistic, based upon facts, disdainful of abstractions, inspired by an evident desire, according to Duguit himself," [1] "to break with the concepts of pure metaphysics, which, as such, belong to the realm of the unknowable, and may serve as the theme for a religious system or for a poetical work, but are entirely foreign to positive knowledge." He takes pains to state in the first pages of his book on "Le Droit Objectif et l'État" [2] that the right of the individual is a "pure hypothesis, a pure mataphysical affirmation, not a reality." As a kind of fiction, a contract is supposed to exist between the individual and the State; in this contract, of which, to be sure, there are no examples in history, the individual makes reservations in his own behalf; there is a whole side of his personality which, by remaining protected, becomes inaccessible. The exigencies of this theory lead one to ascribe to the collectivity a borrowed per-

[1] "Le Droit Constitutionnel et la Sociologie," RE 1889, p. 487.

[2] P. 12. [P. 248 post.]

sonality, to regard the State, in opposition to the individual, as also a subject of the law. It has been possible at certain epochs for these doctrines to be utilized. They have furnished a means of limiting the absolute power of the State, of checking arbitrariness in government and tribunals, and of greatly furthering the progress of public law. But like all artificial principles, they lead to unsound conclusions. They falsely oppose the individual to the State, so that whatever is lost by the one appears to have been gained by the other. They assign fixed, invariable limits to the State, whereas in reality these limits vary with the times, with the social environment, with circumstances, and with the character of the citizens. They determine these limits negatively rather than by conferring positive attributes upon the State. They are in contradiction to the law of evolution; the claim that the rights of man can be fixed by immutable, universal rules is incapable of realization.

§ 95. *Duguit and the Solidarists.* Duguit thus avoids discussion of subjective law, the law which has its source in the individual himself. For Duguit, the law is above all an *objective* principle which comes from without instead of from within. Faithful to his realistic method, he professes to base this principle upon a fact, the fact of solidarity. This fact is not a rule of conduct, but a spring of action. Every man conceives of himself as in relations of solidarity with his fellows, which means that he is useful to others and that they are indispensable to him. Man is thus individual and social at the same time, and the more his individuality develops, the more closely he feels bound to other men, and consequently the more social. Individualization and socialization, far from opposing one another, make for mutual service.

What distinguishes Duguit from the other adherents of Solidarism is that he does not pretend to give a moral

value to the fact of solidarity. There is nothing imperative in it; it issues no commands, it impresses by its inherent qualities, by its intelligibility alone. "We do not say that man ought to coöperate in social solidarity because that coöperation is good in itself, but that man ought to coöperate in social solidarity because he is a man, and because as such he cannot live except by solidarity. We do not say that the act of coöperation in solidarity is good; we say, the act of coöperation has a social value and social consequences." [3] Conformity to solidarity is not a rule of ethics; it is a rule of law. All individuals — and the term "society" is only a designation of the mass of individuals — have and can have but one object, to live in conformity with solidarity. The consequence of man's inability to live except by solidarity is that every act which tends to realize this solidarity compels the respect of the social body.[4] Inversely, every man should refrain from any act inimical to social solidarity. The principle is constant, but as the forms of solidarity are susceptible of infinite variation, the rule changes to correspond; the jurist adapts it to the conditions of the environment and of the period. Unlike natural law, it lacks the disadvantage of being absolute and immutable.

§ 96. *Relations to Predecessors and Contemporaries.* While denying the existence of these subjective natural rights, rights based on pure belief or on a respect for the human person — and this is from our standpoint a characteristic trait—Duguit yet guards against the misleading conclusions of the German realistic doctrine. He is opposed to the absolutist doctrine of the unlimited power of the State, or of its self-limitation, which is, as he says, only a form of omnipotence in disguise.

[3] "Droit Constitutionnel," p. 16.

[4] Ibid., p. 84.

The acts of rulers are not legitimate, in his eyes, unless they conform to social solidarity. Duguit puts great emphasis on the right of minorities; he is an advocate of proportional representation; he looks upon the referendum, the dissolution of parliaments, as excellent institutions, because they maintain solidarity between the governing and the governed. He censures in the name of his own principles most of the abuses which we condemn out of respect for the rights of man — the removal of any class of persons outside the pale of the law, as for example, the regulation of prostitution by the police. So, although Duguit denies, as we have already pointed out, every a priori, every moral belief, every metaphysical principle, he leads us to the very conclusions which follow naturally from these principles and these beliefs. "M. Duguit would have governments be of that superior form of justice which is identical with solidarity." [5]

Deslandres [6] likewise observes: "Certainly M. Duguit is inspired with ideas which are exactly opposed to those of a Rousseau, or of an individualist of the Constituent Assembly of '89, or of a Liberal individualist such as Benjamin Constant; it is nevertheless true that his position is the same as theirs on the question with which we are now occupied, the foundation of the law. There is, spanning the centuries, a considerable group of minds which have believed in one justice, in one ideal social order flowing from the nature of things, from reason, from the natural rights of man, and from the social fact which inevitably inspires positive law and gives it that legitimacy which, indeed, exists only to whatever extent positive law depends upon that fact."

§ 97. *Solidarism Furnishes but a Weak Foundation.* But are Duguit's conclusions derived logically from his

[5] Barthélemy, RDP 1908, p. 162.

[6] "Étude sur le Fondement de la Loi," RDP 1908, p. 10.

principles? We do not hesitate to believe that Duguit lends to his principles a virtue which they do not possess.

Apropos of Solidarism, we have already established the impossibility of passing from fact to duty, from "the enunciative to the normative." In this respect, the illusion of the earliest adherents of Solidarism was short-lived. All of them, or very nearly all, acknowledged that the fact of solidarity was incapable of being transformed logically into an obligatory rule. Man reckons with facts according to the measure of his powers; he encounters them in his experience, he perceives the advantage or the harm which they may bring to him, he tries to make sure of some facts and to evade others, and is more or less successful in his effort. But the ability which he displays in confronting natural facts, his utilization of the forces of nature, his precautions against fortuitous events, these are only a form of Utilitarianism. If it be true, as Duguit believes according to his statement, that solidarity has no intrinsic moral worth, that it is neither good nor bad, then every man can understand it and utilize it in whatever way will serve his own interest. The man who is acute enough to perceive the bonds which unite him to his fellow men may say to himself: "I am dependent on others, others are dependent on me; my interest is to do the least possible, and to gain the most, to shift my burden to the shoulders of others, and to take from them as much as I can." That will be his fashion of utilizing the principle of solidarity. Obviously we must also admit that, in order to secure satisfactory results from this principle, we must understand solidarity in one certain way, must make a choice, eliminating some forms and retaining others. When a tribe of negroes attacks a neighboring tribe, to reduce it to slavery, its victory may be considered the expression of one phase of solidarity. Of

two groups that are numerically equal, the stronger, the one capable of enslaving the other, is the one which has the most highly developed sense of solidarity. And solidarity itself is not the only natural fact; the struggle for existence, inequality of strength and skill, are also natural facts. By the same token, why may they not suggest some rules of conduct?

§ 98. *Objective and Subjective Law.* What is apparently another illusion of Duguit's is the importance which he attaches to his conception of objective law, and his indifference to subjective law. For him, law is first of all objective, because its source is not in the individual himself, but in the external fact of social solidarity." [7] "There can arise from that principle no subjective right nor subjective obligation, but only a certain power, that of willing a certain thing, with certain results — and to speak exactly, we cannot characterize that power of willing as a subjective right. Let us call the power objective, determining exactly what we wish to express by that term." [8]

In his "Traité de Droit Constitutionnel," Duguit agrees to consider as subjective right that power which the individual has of effectively willing a result conformable to the rule of law. "Since objective law," he says, "is founded on social solidarity, subjective law is derived from it, and logically so. Indeed, since every individual is obliged, according to the principle of objective law, to coöperate in social solidarity, it necessarily follows that he has the right to perform any such act of coöperation, and to prevent any one whomsoever from interfering with the fulfillment of the social rôle which is incumbent upon him." [9]

[7] "Droit Constitutionnel," p. 16.
[8] "L'État," v. i, p. 144.
[9] "Droit Constitutionnel," p. 16.

Let us not pause over what is obscure and equivocal in this terminology; but let us bear in mind this idea, that the law is first of all an objective rule, a rule to which social respect is considered to be given at any moment as a guaranty that the common interest will be promoted; violation of it arouses a collective reaction against the individual who is guilty of the violation.[10] We prefer to believe with Gaston Richard that subjective law is an idea of considerable significance, one that has a very real sociological meaning. "If it is not the basis and the condition on which objective law rests, it is at least its reason for existence. Law is objective only in so far as it is obeyed."[11] It is not social constraint which gives to the law its seal of legitimacy and makes certain that it will be respected; it is the inner consciousness of the agent who appeals to the law or obeys it. This inner consciousness, this idea of law, is essentially subjective. What has led Duguit to consider the legal rule as objective is the desire to do away with the old notion of individual right, which to him seems hypothetical and based on an a priori principle. But this notion was more essential than he supposed, since after discarding it he has taken it up again under fresh guise and name. "Man living in society has rights; but these rights are not prerogatives to which he is entitled as a man; they are powers which are his because as a social being he has a social duty to perform and must have the right to perform it."[12] Is it not possible that beneath some surface differences it is really the old doctrine? To Duguit, as Barthélemy says,[13] solidarity is only a

[10] Ibid., p. 1.

[11] G. Richard, RP 1909, p. 317.

[12] "Droit Constitutionnel," p. 16.

[13] RDP 1908, p. 159. *Gény* made the same point. "In reality, this objective law is enough like the old natural law to be mistaken for it, like that universal, immutable law, the source of all positive laws, which

scientific conception of justice; in the discussion of his theories let the word "solidarity" be replaced by justice, and the general sense will not be changed.

§ 99. *Duguit an Unconscious Idealist.* This is an interesting form of that unconscious idealism of which we have mentioned other examples. Duguit is a pseudo-Positivist; if he censures arbitrariness, the tyranny of the violent, the oppression of the weak, the fact is due, in his case, to a faith as yet unconscious of itself, and destined perhaps to reveal its presence in the future. [14]

was spoken of in the plan of the civil code of the year VIII. Nevertheless, I have no doubt that M. Duguit would cry out and protest with all his might against such a comparison" (RCL 1901, p. 508). Cf. *Hauriou* and *A. Mestre*, "Analyse du Livre de M. Duguit sur l'État," RDP 1902, p. 358: "Here are the dogmas of scientific Positivism and here are their consequences; they constitute the state of mind of a whole generation which has allowed itself to be duped by Spencer and Haeckel. Let us add a certain natural optimism, a generous sentimentalism, and we shall have reconstituted the obvious apriorism by which M. Duguit has unconsciously been guided."

[14] "With the same genuine and disinterested sincerity which caused him to abandon the organismic doctrine and the identification of social phenomena with physical or biological phenomena, he will some day be heard to admit that in the order of the social sciences metaphysics has its necessary place alongside the observation of facts, that duty cannot be derived from knowledge alone, and that law finds no truly objective basis except in the depths of moral consciousness." (*Gény*, RCL 1901, p. 510.)

CHAPTER XII

CONFLICTS BETWEEN LAW AND THE INDIVIDUAL CONSCIENCE

SOURCES OF THE CONFLICT — THE CONFLICT HISTORICALLY CONSIDERED: (1) ITS ABSENCE FROM THE ANCIENT WORLD; (2) ITS RISE WITH CHRISTIANITY; (3) THE "PACTUM SUBJECTIONIS" AND THE RIGHT OF REVOLT; (4) THE ATTITUDE OF THE CHURCH; (5) TYRANNICIDE; (6) THE RIGHT OF RESISTANCE IN THE FRENCH CONSTITUTION; (7) CONSERVATIVE INTERPRETATIONS IN OUR COURTS — THE PROBLEM CONSIDERED IN ITSELF: (1) AT FIRST IT SEEMS INSOLUBLE; (2) THE LOGIC OF LIFE A HARMONIZING FACTOR; (3) THE DUTY TO PROMOTE THE INTERPENETRATION OF TWO WORLDS — CONCLUSION OF THIS WORK.

§ 100. *Sources of the Conflict.* The partisans of natural rights are not so much disposed as formerly to balance personal conscience against the conscience of the mass, the individual against the State. The idea of individualism has changed; it has been given new life and a different form by the idea of solidarity. The cooperation of other men seems necessary to the development of the ego. But conflict cannot always be avoided, and takes on at once an acute, an almost tragic character. We have seen only too frequent examples of this in the course of recent years.

Almost everywhere military service has become compulsory; the law permits no exceptions. What shall a man do whose religious principles forbid his bearing arms,

who looks upon war as common murder, as a crime? The army must often intervene in strikes. Military discipline admits of no exceptions; the workingman, incorporated in the army, is a soldier like any other. In the course of a strike, he may be called upon to march against men whose views and whose interests are the same as his own. They may be his acquaintances, his friends, his relatives. If he is ordered to fire on them must he obey?

Troubles growing out of an enforcement of measures of religious politics have created grievous situations and crises of conscience. An officer influenced by religious feeling, to whom the violation of an edifice consecrated to worship is a profanation, is ordered to break in the doors of a church; what should he, what can he do?[1]

Which should prevail in these cases of conflict between conscience and the law, and who shall be the judge? Before looking into the problem, let us consult the past; for it will interest us to inquire how men have acted in former times, and what doctrines they have formulated.

§ 101. *The Conflict Historically Considered.* 1: ITS ABSENCE FROM THE ANCIENT WORLD. The ancients seem to have known nothing of this duplication of one's personality. The individual belonged wholly to his group, to his family, to his city, which could dispose of his property, his liberty, his life, and his honor, and could control or dictate his belief. Even if unjustly condemned, he must submit, and respect the law's omnipotence. When Crito offers to Socrates the means of escape into Thessaly, the master refuses, believing himself bound to undergo the punishment to which the magistrates have condemned him.

[1] The much mooted question of the right of an official to strike seems to us to belong in the same class. The status of the functionary is determined by the law; the functionary who goes on strike revolts against the law. But in certain cases cannot this revolt be justified?

2: Its Rise with Christianity. We have seen that it is Christianity which first opposes the individual to the State, or conscience to the law. It was in obedience to conscience that the Christians defied the law of the State and gave themselves up to martyrdom. Persecutions carried on in the name of orthodoxy have also made their martyrs; wherever the religious majority, supported by the secular power, seeks to impose its belief on the minority, the latter invokes conscience as its law and offers resistance. It is persecuted in the belief that religious unity is indispensable to the unity of the State.

3: The "Pactum Subjectionis" and the Right of Revolt. The question of the right of revolt is warmly debated by the philosophers and the theologians. Most of them admit the existence of this right, founded on an implied clause in the "pactum subjectionis" which binds the subject to the sovereign. If the sovereign violates his obligations, the contract is no longer valid, and may be annulled; the king may be deposed. Some thinkers, like Hubert Languet and Mariana, go so far as to admit that tyrannicide is legitimate; but the majority stop at the right of revolt, and the greater part of this majority authorize only measures of collective resistance. Previously to the "pactum subjectionis" the sovereignty belonged to the nation, which alone could reclaim it.[2]

4: The Attitude of the Church. Among these conflicting opinions the Church remains neutral. As a general principle, it considers all temporal power as

[2] In the "Vindiciæ contra Tyrannos," attributed to *Hubert Languet*, it is the representatives of the people, that is, the high officers of the crown, who alone are concerned with the manner in which the "pactum subjectionis" is observed, and who at need can urge the deposition of the king by the assembly of the three orders. (Cf. *Atger's* "Histoire des Doctrines du Contrat Social," p. 118.)

deserving of respect, because derived from God. The right of revolt is condemned by Gregory XVI in his Mirari Vos encyclical (August 15, 1832) and in the syllabus accompanying Pius IX's Quanta Cura encyclical (December 8, 1864).[3] But it is generally admitted that these propositions do not exclude the legitimacy of the right of revolt in extreme cases. In the Libertas encyclical issued by Leo XIII (June 20, 1888), it is written, "Nor does the Church condemn the desire to free one's country from a foreigner or a despot, provided that this may be done without a breach of justice."[4] In fact, as Balmès says,[5] the Church neither approves nor formally condemns any of the intermediary theses; and the question is left to the discussions of the canonists. These distinguish several forms of resistance — passive, defensive, and aggressive. Passive resistance consists in refusing to obey the law voluntarily, yielding,however, to force; it is universally regarded as legitimate.[6] Defensive resistance opposes violence to violence, and here again, approval is practically unanimous.[7] Aggressive resistance is organized violence directed against injustice, and is properly speaking insurrection. It is over this subject, naturally, that most of the controversies arise;

[3] The proposition condemned is formulated as follows: "It is permissible to refuse obedience to legitimate princes, and even to revolt against them." (Proposition lxiii.)

[4] "Neque illud Ecclesia damnat velle gentem suam nemini servire nec externo nec domino, si modo fieri incolumi justitiâ queat."

[5] "The Church has refrained from condemning any of the opposed doctrines." (*Balmès*, "Le Protestantisme comparé au Catholicisme," Paris, 1834, v. 3, p. 214.)

[6] "Verum ubi imperandi jus abest, vel si quidquam præcipiatur rationi, legi æternæ, imperio Dei contrarium, rectum est non parere scilicet hominibus, et Deo pareatis." (Leo XIII's Libertas encyclical, June 20, 1888.)

[7] See the 4th instruction from the Janvier canon, "Des droits de la conscience vis-à-vis de la loi injuste." (Notre-Dame-de-Paris lectures, 7th year, no. 7. Lenten sermons of 1909, p. 54.)

the prevailing opinion is that it can be admitted only as a last resort, "ultimum remedium." [8]

5: TYRANNICIDE. Carried to its furthest limit, the doctrine of the right of resistance justifies tyrannicide. That this subject has been passionately discussed at certain periods of our history is well known. At the time of the League, the Catholic writers, or at least the extremists among them, held that tyrants should be put to death. [9] After the massacre of Saint Bartholomew, the Protestant writers asserted the right of insurrection; but most of them refused to excuse regicide, or at most excused it as did Théodore de Bèze, only if the tyrant was a usurper.[10]

6: THE RIGHT OF RESISTANCE IN THE FRENCH CONSTITUTION. At the beginning of the Revolution, all of these doctrines constituted just so many precedents, ready to be invoked whenever the time arrived. Among the rights enumerated in article 2 of the first Declaration of the Rights of Man, after liberty, property, and safety, comes *resistance to oppression*. There is no definition of the character or the bearing of this right of resistance either in the Declaration, or in the constitution of 1791, or in the discussions which preceded them. The Declaration of Rights placed at the head of the constitution of June 24, 1793, is more

[8] Borrowing and developing an argument of St. Thomas, the Janvier canon states: "Sedition is a revolt against the good, and in these extremities of which I speak, the really seditious thing is the power which is put forth to wrest souls from a respect for truth, for order, and for justice; it is not the community struggling to save its honor, its dignity, and its life" (loc. cit., p. 54). Cf. "Summa Theologica S. Thomæ:" "Magis autem tyrannus seditiosus est, qui in populo sibi subjecto discordias et seditionem nutrit, ut citius dominari possit." (Secundæ partis articulus ii, conclusio questionis xlii; Lyons, 1677, p. 94.)

[9] *Douarche*, "De Tyrannicidio apud Scriptores XVI Seculi" (Latin thesis), 1888.

[10] From "Le Droit des Magistrats sur leurs Sujets." Cf. *Duguit*, "Droit Constitutionnel," p. 678.

explicit[11]; but among the passages relating to resistance to oppression, only article 35 is sufficiently general to imply that any attempt, whether legal or not, against the rights of man amounts to oppression. Even this, however, is not very clearly stated. The other provisions relate to cases in which oppression results from arbitrary measures, that is to say, from those contrary to an express law. Everything points to the conclusion that the constitution does not willingly admit that there may be cases in which resistance to the law is a legitimate right.[12]

In what degree is the right of resistance recognized to-day ? To answer this question, we must distinguish two kinds of cases — those in which the measure resisted is unlawful, and those in which it is lawful, indeed, but regarded as iniquitous. In the first place, statutory and judicial law afford a certain protection to citizens aggrieved by violation of the law, even when this is the act of agents of the public authority. If the act is inspired by personal feeling, that is, if the agent has exceeded his function through malevolence or passion, he becomes personally responsible and is liable for damages. If the act is a fault of procedure, the administration may be held responsible, but this responsibility assumes, in several instances, an exceptional character. Thus an unjust sentence involves the State

[11] "Art. 11. Any act committed against a man except within the cases and according to the forms prescribed by law, is arbitrary and tyrannical; that person against whom an attempt is made by violence to execute the law, has the right to repel it by force.— Art. 32. Resistance to oppression is the consequence of the other rights of man.— Art. 33. It is oppression of the social body for a single one of its members to be oppressed.— When the government violates the rights of a people, insurrection is for the people and for every portion of the people the most sacred of rights and the most indispensable of duties."

[12] "Art. 10. Any citizen summoned or laid hold of by the authority of the law ought to obey at once; he renders himself guilty by resistance."

only in so far as the innocence of the person sentenced has been established by a judgment or a writ of review.[13] If no sentence has been pronounced, as for example when an indictment has been thrown out or an acquittal rendered by a court having jurisdiction, the wrong caused by a rash or erroneous examination is not sufficient ground for reparation. There are two kinds of protection against the administrative commands of public authority: if an order has not been made legally[14] violation of it is not punishable; incompetency or violation of law opens the way for an appeal to the Council of State against abuse of power.

7: Conservative Interpretations in Our Courts. Aside from these legal means, may one forcibly resist agents of the public authority who are acting in violation of the law? The penal code of 1791[15] did not qualify as rebellion any resistance offered to a public officer, except when that officer himself had acted legally in the line of his duty. Certain codes, for example the German, the Hungarian,[16] and the Italian [17] still treat the existence of the offense of rebellion as governed by the legal character of the act performed by the representative of authority. Article 209 of the French penal code contains no definite statement, and defines as rebellion all violent resistance to, or assaults upon, the agents of the administrative or judicial police, acting in execution of the laws, commands or ordinances of public authority, or the decisions or mandates of the courts. It does not say whether the

[13] Art. 445, Code d'Instruction Criminelle, modified by the Law of June 8, 1895.

[14] Art. 471.

[15] Part 2, title 1, sec. iv, art. 1.

[16] Cf. *Garraud*, "Traité de Droit Pénal," v. 3, p. 524, note 32.

[17] Penal Code of Italy (art. 192) and the note in the Lacointa translation.

orders given to the executive agents must be regular, and conformable to law. This uncertainty permits two possible modes of interpretation. Some would say that the distinction could be drawn only from the text of the law, and the text does not contain it. The legality of acts of authority may be subject to judicial inquiry, but refusal to obey and recourse to violence are not to be permitted in any case. By others it may be argued that the code cannot have intended to condemn, by simple omission, a long established tradition. Before the Revolution, under a régime which permitted so much that was arbitrary, it was nevertheless recognized that in certain cases agents of authority might be resisted with violence if they were acting in an illicit manner.[18] The appellate courts have decided somewhat frequently that resistance to unlawful acts is not punishable.[19] The Court of Cassation has been more conservative, and is little disposed to give open sanction to the right of resistance; yet in certain cases it has admitted that resistance to unlawful acts could not be regarded as rebellion.[20] But all of these were cases of flagrant illegality, the agents resisted not being, for example, provided with warrants.

Infringement of personal rights may be compared with unlawful acts involving things. A question arose when measures were taken against private property occupied by religious congregations. After the expulsion of these congregations, the chief of police closed and sealed the doors. Did the proprietor who broke the seals commit an offense? According to certain decisions[21] he was

[18] *Jousse*, "Traité de la Justice Criminelle," v. 4, pp. 79 and 80.

[19] Lyons, June 10, 1824; August 24, 1826. Riom, January 4, 1827. Limoges, February 28, 1838. (Sirey 1838.2.300.)

[20] Cassation, April 7, 1837. Sirey 1838.1.641. March 25, 1852. Bull. Crim. p. 108.

[21] Rennes, October 27, 1902; GT October 30, 1902. Chambéry, October 4, 1902; GT October 22, 1902.

not guilty; but the Court of Cassation ruled to the contrary.[22] It is difficult to say whether the Court meant to condemn indiscriminately all resistance to acts of public authority, or whether it merely meant to affirm that in this case there was nothing illegal in affixing the seals. In general it is held, as Barbeyrac[23] once maintained, that for one to escape punishment it is not enough that the action opposed should be illegal; this illegality must be manifest and intolerable. This is an uncertain criterion. For one thing, it is not so easy as one might suppose to recognize illegality; for this can nearly always disguise itself so artfully as to resemble the right; it appeals to the texts, and invokes or evades them by subtle distinctions. It is still more difficult to weigh the gravity of the illegal act. "If in a given case," says Chavegrin, [24] "it is certain that the law has been broken, and we inquire whether the violation has been intolerable, the reply will vary with the times and with the people. One has only to turn to written works on the subject to find how widely divergent they are; the decisions of the courts are no more consistent."

So we may say that resistance offered to an officer of the law is in fact rarely looked upon as legitimate; it is an act of courage involving considerable risk. It is still more dangerous to refuse, from conscientious motives, to obey the law. If the law has a penalty, this penalty is inevitably incurred. At most, the motive of the offender may be taken as a mitigating circumstance.

In general, within unified, well consolidated groups, a refusal to submit to the law for conscientious reasons causes amazement in the beginning, rather than anger. It not infrequently happens that acts are not repressed

[22] Cassation, November 28, 1902, December 26; January 2, 1903. Sirey 1904.1.59 and the note by *Chavegrin*.

[23] Note on *Grotius*, 1759 edition, v. i, p. 171, note 4, § 2.

[24] Sirey, loc. cit., p. 59, col. 1.

at first, or are dealt with very leniently. During the Revolution, the Anabaptists of Alsace sent delegates to the convention to explain that their religion forbade their bearing arms. As a consequence, a decree of the committee of public safety "invites the competent authorities to use men of this sect in the transportation service by preference, or even to exempt them for a money payment." [25]

In certain countries, Switzerland, Sweden, Norway, and even Germany, for example, proceedings have not been taken against stubborn conscripts of this sort; they have merely been assigned to unarmed auxiliary service. It was doubtless remembered that such cases have been extremely rare, that rigorous punishment would seem excessive, attract attention, and excite pity. In France, however, it has been felt to be impossible to make exceptions. In the cases which have arisen, the young men who refused to take up arms were brought before a council of war, punished for disobeying orders, and sent back to their regiment at the end of their term of punishment; when their resistance continued they were prosecuted and sentenced again. The situation seemed without issue, but a way out of it had to be found. After an at least apparent submission, a compromise was effected by reduction of military rank and assignment to an auxiliary corps. The only advantage gained by these condemnations was the discouragement of pretenders; but this was perhaps offset by the harm resulting from a punishment which public sentiment disapproved, and which seemed both maladroit and too severe. There is no doubt, however, that energetic repression would have been resorted to if these cases

[25] Communication from M. Kellermann to the 2d National Congress of the French Peace Societies: Report of the sessions, Nimes, 1904, p. 46.

of resistance had so multiplied as to constitute a real danger to the State. Under these conditions, any group thus threatened defends itself with extreme determination[26] until such time as, by a kind of contagion, the resistance of individual consciences modifies the public conscience. Repression is then powerless; in a contest of this kind, conscience triumphs over the law.

§ 102. *The Problem Considered in Itself.* 1: At First it seems Insoluble. It is now proper to face the problem in itself. At first glance it seems insoluble. To sacrifice the law to individual conscience is to destroy its authority; it is to permit each citizen to be his own judge of what he should or can concede; it is to establish a kind of "liberum veto," every law being submitted for ratification to those who owe it obedience; every person remaining free to refuse to obey, and to treat the law as inimical to conscience and violative of natural rights. It is a régime which makes all government impossible. Undoubtedly there will always be some who think, or pretend to think, that the law is not legitimate, and that they are not bound to respect it. Often a conscientious reason will serve merely to mask a selfish one. On the other hand, it seems an equally serious thing to subordinate conscience to the law, which then becomes a mere instrument of tyranny. Not only is the citizen unjustly oppressed, but the law loses its own basis when it offends the very feelings from which respect for it arises. A law which disregards the rights of conscience ceases to be a juridical rule; it is only a "blind and despotic force." [27]

2: The Logic of Life a Harmonizing Factor. The conflict seems incapable of adjustment. There

[26] Thus federalistic attempts are relentlessly thwarted in countries the unity of which is established.

[27] *Boutroux*, "La Conscience Individuelle et la Loi." RMM 1906, p. 14.

are, however, many such problems which the logic of concepts does not solve, but for which life must furnish a solution at whatever cost. Each of us succeeds, to a greater or less degree, in reconciling sentiment and reason, knowledge and faith, freedom and moral obligation, duty towards one's country and duty towards humanity. As Boutroux says,[28] "there is a logic other than logic properly so-called, or the logic of concepts; there is the logic of life, of reality, of nature, of reason in the full and concrete sense of the word. While dialectic shows, with the facile clearness of its spatial language, the reciprocal impenetrability of the unit and the multiple, of the one and the other, nature is pleased to unite them in her creations."

Moreover, as Boutroux points out, conscience and the law are ideas which are solidary rather than in opposition. They complete and support each other. What kind of law is it which disregards rights of conscience? What kind of conscience is it which does not feel the necessity of submitting to the law, of sacrificing itself to order and the common weal? Conscience should not be represented as a fortress, as a place of refuge, inacessible to the law; nor the law as a sovereignty in a separate domain. "However skillfully the delimitation of the two domains be made, it will still be artificial. Man is one, as is the world in which he lives. Conscience and the law are two creations of the mind, not preëxistent, impenetrable things. Look beyond the metaphors, look for the real behind the abstract and the scholastic, and you will see law and conscience intermingled, each determined by the other. This is the key to history; this is the true logic, not of dialectic merely, but of life and reason."[29]

[28] Loc. cit., p. 10.

[29] Loc. cit., p. 15.

3: The Duty to Promote the Interpenetration of two Worlds. We must try, then, to "maintain and to promote this interpenetration as far as possible." We must at the same time contribute to the establishment and development of the spirit of legality, must encourage men to love and respect the law, to love and respect human personality, to preserve it from all oppression, to commit no offense against its dignity. Duty consists in taking up the defense of the one or the other according to circumstances. "If the cohesion of the community is threatened, we should strive to maintain it; if the dignity of the conscience is imperiled, we must come to its rescue." [30]

May we not hope that the time will come when this equilibrium will be permanently established, when the two ideas will be completely merged, when it will be perceived that conscience and law, far from contradicting each other, offer and receive a mutual support?

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§ 103. *Conclusion of this Work.* We have tried to show why and how there has been a renascence of natural law. The confirmation of natural law, or more exactly of juridical idealism, has appeared to us to offer the only solution for the crisis in legal philosophy. This crisis results from the impracticability of rationally and scientifically vindicating the idea of law, and from the insufficiency of the expedients, the empirical processes, which deplete it of its moral content. If it is possible neither to justify the idea of law nor to do without it, the only escape from the dilemma lies in performing an act of faith. The idea of law is accepted as a belief, as a datum of feeling. It is possible that there is an element of Pragmatism in this conception, but it is a mitigated

[30] Loc. cit., p. 15.

Pragmatism, subjected to the control of reason; here reason does not contradict feeling, nor is there any discord between the two.

The idea of natural law, then, is differently conceived from the way it formerly was. It rests upon another foundation, and at the same time it undergoes certain transformations. It reconciles itself with the idea of evolution, with that of utility. It loses its absolute, immutable character, for it possesses only a variable content. It takes account of the interdependence of the individual and the community; it thus tends to bring the individual conscience and external law into accord, instead of setting them in opposition.

Legal idealism has not become enfeebled by reason of its transformation; on the other hand it has been compacted and enlarged.

PART II

SOME IMPORTANT POINTS OF VIEW IN CONTEMPORARY FRENCH LEGAL PHILOSOPHY

(A) Synthesis of Idealism and Naturalism — Alfred Fouillée

(B) Theory of Objective Law Anterior to the State — Léon Duguit

(C) Analysis of Fundamental Notions — René Demogue

(A) SYNTHESIS OF IDEALISM AND NATURALISM — ALFRED FOUILLÉE

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(A) SYNTHESIS OF IDEALISM AND NATURALISM — ALFRED FOUILLÉE

CHAPTER I[1]

CRITICISM OF THE TRADITIONAL IDEA OF LAW BASED ON FREE WILL

INTRODUCTION: THE LAW AND LIBERTY, THEORY OF THE IDEAL RIGHT — THREE PHASES OF THE PROBLEM OF FREEDOM — THE VALUE OF FREEDOM, ITS RELATION TO ITS END — THE INMOST NATURE OF FREEDOM — FREE WILL AND FREEDOM OF INDIFFERENCE DISTINGUISHED — DOES FREE WILL JUSTIFY "INVIOLABILITY?" FREE WILL AN INADEQUATE BASIS FOR LAW — PARADOXICAL CONCLUSIONS — FURTHER LIMITATIONS OF THE DOCTRINE — SCIENTIFIC OBJECTIONS TO FREE WILL — THE DIFFICULTIES SUMMARIZED — THE ERROR OF COMPLETE RENUNCIATION OF FREE WILL — CONTRADICTORY VIEWS TO BE RECONCILED — THE SUBJECT FURTHER OUTLINED.

§ 104. *Introduction*: *The Law and Liberty, Theory of the Ideal Right.* The ancients conceived the human world and the physical universe as of the same type. The physical universe was a sphere enclosed by a crystal vault, within which was the earth, a single center for all bodies and for all the stars. Similarly the State was

[1] [Chapters xiii to xviii (inclusive) = Book IV of *Fouillée's* "Idée Moderne du Droit," this division of the original work being entitled "Law and the Idea of Liberty — Theory of Ideal Right." For this author and work, see the Editorial Preface.—Ed.]

a closed sphere, within which all was subordinate to a single power. According to this absolutist idea, the individual could find his value and his rights only in the State; and legal or political systems were hardly anything but systems of centralization. Little by little the old conception has given way to a more liberal one, and the modern idea of the social order is not without analogy to the modern conception of the astronomic scheme. Shattering the crystal sky with which Aristotle surrounded the world, science has made the universe an infinite sphere, the circumference of which is nowhere; and at the same time, instead of a single center, it has placed the center everywhere, for every object gravitates towards all the others and all the others gravitate towards it. The controlling force, formerly centered in the motionless earth, is now dispersed through infinite space, and coincident with being and motion resides in all objects alike. The stellar universe is in a sense decentralized, and it is the same with the moral and social world; its limits recede to infinity and particular groups tend to lose themselves in the universal society. True law is no longer the mere will of a prince or the interest of a people; it is the right of all mankind. As a result of this, the center of law is everywhere, and each individual may be considered in turn as end or as means, as obeying or commanding, as subject or legislator, in the "universal republic."

As we have seen, it is especially in France, thanks to the spontaneous or reflective tendencies of the national mind and the national philosophy, that this doctrine has attained its highest form and that its application has been attempted. Now its philosophic basis is a principle which at first sight seems simple, but which is really difficult to justify: moral freedom considered as absolutely inviolable. This principle is to-day battered and

breached in every part; and it is necessary to subject it to a close analysis, for we cannot neglect here that study of principles without which applied law and politics run great risk of going astray. "When I had discovered my principles," said Montesquieu, "all the rest came to me."

§ 105. *Three Phases of the Problem of Freedom.* The philosophers of pure, abstract legal right, especially in France, have too often clung in their theories to vague and general expressions concerning the "dignity" of the human being and the "respect" which is his due, instead of settling these three points: the value of freedom, the relation of freedom to its end, and the inmost nature of freedom.

§ 106. *The Value of Freedom; Its Relation to its End.* In the first place, the basis and the degree of that dignity attributed to free beings should have been more precisely indicated. Is it limited or infinite, subordinate or independent, relative or absolute? In other words, exactly for what reason is freedom to be looked upon as grand, noble, inviolable? Is its value inherent in itself or is it borrowed from a higher principle? Victor Cousin, and the French Spiritualists generally, subordinated freedom to duty, to the "moral law," to the "mandates of reason," to a rule established by the intellect; but how could they at the same time maintain that free will is in itself sacred and worthy of respect? How can freedom be thus inviolable and still subordinated to an end? This relation of freedom to its end was imperfectly explained by the school of Victor Cousin. Indeed, it was no longer thought, as by Kant and Fichte, that the end of freedom is freedom itself; their doctrine that "humanity is an *end in itself*," in the strict sense of the words, was no longer prevalent; neither was that of Proudhon and the adherents of independent morals,

that justice is human and only human, that the principle of law is man himself and not some superior being or some higher ordinance. Thus freedom remained a mere *means* for the accomplishment of our destiny. Now it does not seem reasonable that anything which is only a means can form the basis of an absolute right. In fact, Victor Cousin and the Doctrinaires have always maintained, along with Royer-Collard and Guizot, what they called "the sovereignty of reason," the "rights of reason"; and they have deduced therefrom, in the field of politics, conclusions favorable to aristocracy, the rights of the wisest and the most reasonable, or of those who are so regarded. The compromise of constitutional monarchy, a mixture of conflicting principles, was the faithful expression of a metaphysic which was itself in some sort constitutional — democratic in its principle of the inviolability of freedom, and aristocratic in its subordination of freedom to a higher commandment.

§ 107. *The Inmost Nature of Freedom.* If the value of freedom and its relation to its end remained thus vague for the Spiritualist school, it was because this school was equally vague concerning the inmost nature of freedom. By moral freedom, most of the French Spiritualists have understood nothing other than the traditional free will, and this free will has never been carefully distinguished from freedom of indifference; for it is reducible to the power of willing at one and the same instant, all else being equal, a thing or its opposite, good or evil, the greatest good or the least. By admitting the existence of this much disputed power, do we find a substantial foundation for law? Not at all. This faculty attributed to man of willing one thing when he might will the opposite, is merely a force with a twofold effect, like the force of steam, which can drive a locomotive backward as well as forward. But is the

locomotive any more sacred and inviolable because one can reverse the steam and employ the motive power for a double purpose? Does it not seem, on the contrary, that this very possibility of two directions, one of which may be extremely dangerous, authorizes and necessitates a vigilant supervision of the engine? It is useless to reply that if the engine is lawless it is because the forward or backward motion really comes from the engineer. Suppose that the will of the engineer can be reversed as easily as the steam, and has the power of willing opposites; or suppose, what amounts to the same thing, that the engine can change its own direction, how can we deduce its inviolability from that? Furthermore, such an engine would be so dangerous to human kind that we should hasten to subject it by all possible means to steadfast control. No less dangerous would be a will capable of willing anything whatsoever—of self-determined, incalculable direction towards all contraries. No one could be safe in its neighborhood. Do we not require the restraint and sequestration of madmen, whose decisions are similarly arbitrary and impossible to foresee? Do we not reëstablish the center of gravity in an inaccurate balance which inclines to the right or to the left? What many philosophers have fancied to be freedom of the will seems, on the contrary, to be its mere madness. Confronted by this fantastic so-called freedom, we would first make haste to get out of its way, and then to turn it out of the road as we would a wagon drawn by an unbridled horse. The metaphysical and moral basis of law can never be found in freedom of indifference.

§ 108. *Free Will and Freedom of Indifference Distinguished.* The Spiritualist school has usually attempted to distinguish between this motiveless freedom of indifference, too evidently foreign to right as well as

to duty, and free will, or that power of choice among the various motives to action which Victor Cousin and his successors made the foundation of right and duty. Freedom of indifference is defined as the power of choice without motive, and free will as the power to choose among several different motives. If in walking I have no motive to go to the right rather than to the left, and if nevertheless I decide on one of these directions, that would be freedom of indifference after the fashion of Reid, a freedom evidently chimerical; but if I have motives of interest for saying the contrary of what I think, and motives of conscience for telling the truth, the choice between truth and falsehood will be the choice between acts supported by different motives, and not between two motiveless acts. Thus runs the argument of all partisans of free will understood as a choice between conflicting motives. Unfortunately, this conception also resolves itself, as one examines it more closely, into a freedom of indetermination incapable of offering a foundation for law. Indeed, in order that a balance may incline regardless of weight, it is not necessary that there should be no weights in the scales; it is enough if the weights are equal and the balance still tips, or if one weight is heavier than the other and the balance still tips to the weak side. In both cases one would have the right to say: Here is a balance tipping in the absence of all weight or even against all weight, an indeterminate balance, indifferent to weight. Such would be the will in a choice between contrary motives.[2]

[2] Suppose, indeed, that the two contrary motives or tendencies are equivalent forces; they will cancel each other, and the choice of the will, which is nevertheless made, is undetermined or without motive. But if these tendencies are not equal, and I choose an act the incentives and motives for which are least strong, which have the least propelling force within me, I act not only without motive, but against all motive. Finally, if I make my resolution in the direction of the most powerful tendencies within the bosom of my consciousness, then there is a motive; but it

§ 109. *Does Free Will Justify "Inviolability?"* Admitting, however, that an equal power of determination among contraries is granted us, how shall we establish law upon that foundation? Here at the end of our circuit we are confronted by the same objections as before: what is there in the idea of total or partial indetermination which commands respect and warrants inviolability? What is there so sacred in possible multiplicity or diversity, whether of thoughts or of volitions? Is a pendulum more worthy of respect because it oscillates? Is an axe with two edges more inviolable than if it had but one? Does a six-chambered revolver confer more rights than a single-barreled pistol? Because by turning my thoughts or my will about in all directions, I might, at my discretion, rob you of your possessions or not rob you, take your life or not take it, evoke one motive or the contrary motive, would you have for me a greater respect? Greater fear, I grant; but as to respect, how can we justify it by this strange reason: "Here is a man equally capable, if he wishes, of becoming a scoundrel or an honest citizen, of evoking at his pleasure motives of rascality or of honesty?" This consummate capacity for scoundrelism, as for honesty, this character

is impossible to see how, with the same innate disposition, with the same nature, and in the same circumstances, I could have made a diametrically opposite decision. To attribute this power to me is to endow me with the chance of Epicurus, the freedom of indifference, which decides, blindfold and groping, with no consciousness of any efficient reason for its act. In fact, this reason is bound to be some power external to the will, some fortuitous concurrence of circumstances, in short a hidden necessity. Shall we say, with certain philosophers, *Jules Lequier* and *Renouvier* for example, that it is I who spontaneously produce the force of my motives and incentives, who confer upon them variable and fluctuating powers in deliberation, and who thus freely control my thought and my sensibilities? This is to push the problem back a stage, and to place the choice between two motives, and not, as before, between two acts. In that case, one chooses without motive, between two motives. The indetermination is carried back, by a vicious circle, to the feelings and to the intellect. (See "La Liberté et le Déterminisme," new edition, 2d part, Book I.)

equally adapted to all motives and all decisions, whence the most contradictory actions may spring, this power, ambiguous and indeterminate in itself (at least on certain points), which creates out of nothing conflicting motives and volitions, and which originates them arbitrarily by an incomprehensible fiat, contains nothing in itself which determines respect more than any other sentiment. Essentially indifferent, even when the motives which it creates for itself are different one from another, this will leaves my own will indifferent to it so long as it does not act. When it does act, I profit by the action if it favors my interests, or I try to hinder it if it opposes them; but in any case, the moral idea of right is inapplicable. The right and the arbitrary, the right and an uncaused beginning — these ideas are mutually exclusive. That royal dictum, "Such is our good pleasure," cannot make inviolable him who pronounces it. From the principle, "I have equal power to do a thing or its opposite, to affirm a thing or its contrary," we cannot conclude: "My power to do a thing or its opposite is a right, and it must be respected."

§ 110. *Free Will an Inadequate Basis for Law.* It will be said that this free will, this absolute power to realize contraries, is the basis of law for the person possessing it, because it distinguishes him from every other being, from things and from animals for example, which can act only as circumstances determine; free will, being superior to all, makes man himself superior to all else. But why, we ask in turn, should this kind of freedom be superior to all else? Once again, why does indeterminateness, wherever it may reside, whether in deliberation or decision, in judgment, passion, or action, constitute an advantage over determinateness? If the absolute power to originate contraries is the highest thing conceivable, superior to all others, it might be

said that this absolute creative power is the essence of good itself; for if any good should be superior to it, then it would no longer be absolute or supreme. Hence whatever it does, it will always be the good, and all its acts, being alike the product of one absolute power, will be good, will be just, will be conformable to law. If, on the other hand, it be said that absolute power to realize contraries has a mandate to follow, and that according to the choice which it makes it merits praise or blame, this presupposes something higher than this power, a higher good, an external imperative imposed upon it; therefore it is no longer the supreme principle; that higher mandate, then, and not the capacity for contraries, will be the basis of law. Moreover, this power will not support, as appeared at first, the responsibility which it is sought to lay upon it, the merit or demerit which it is desired to establish. In fact, merit and responsibility presuppose imputability, and this presupposes a certain bond between actions and the *ego* which performs them. If a certain action or its motive arises from the obscure indeterminate depths of one's being, from which contrary action might have issued quite as well, as the lightning flash leaps unforeseen from the cloud, if the action begins *absolutely*, without being joined at all points to the ego, without being adequately related to its antecedents, what bond can there be between the being and the action? How can we attribute to the being himself the merit of an action which is in a sense detached from him, which certainly is not a consequence of his character, which is like an absolute accident, a "clinamen," and not an essential mark of his qualities? Free will, in so far as it is power to judge or to do either a thing or its opposite, cannot be distinguished from chance, as Epicurus saw very clearly; but chance is no foundation for imputability or merit.

§ 111. *Paradoxical Conclusions.* But this is not all. If free will, the power to choose between contraries, is the highest of all things, virtue, which diminishes that power, is of no greater value than vice, which reduces it also. Does not a virtuous man deprive himself of the power to *choose* between good and evil? Does he not become incapable of committing a murder, a theft, an infamous crime? He increases the share of determination in his will at the expense of indetermination; hence he diminishes his absolute freedom to realize contraries, and if this liberty is the good, the right, the object of supreme respect, the virtue which diminishes it is a vice. Freedom issues forth from that indetermination and that mystery behind which it was veiled at first like a divinity in the temple; it takes on a definite form and figure; it assumes a *character*, and distinct, and to a certain degree human, features. It is no longer a divinity; it has declined from the absolute and descended to the relative. It is no longer superior to the understanding and, as Plato said, to the *essence*; it takes on a definable essence and specific qualities; hence it is no longer the absolute free will.

§ 112. *Further Limitations of the Doctrine.* We see that free will, which can act alike with reason or against reason, does not seem to confer upon us any greater inviolability than if we were constrained by necessity to the best or the most useful. If we regard free will as the highest possible object of our pursuit, it is in its indeterminateness that we find the supreme goal and the law which is derived from it. If we are content to regard free will as a means, we give way, voluntarily or involuntarily, to the theocratic doctrine, with its distrust of freedom as the instrument of evil as well as of good, the origin of sin and of the contagion of sin — a doctrine which must lead to the suppression of *human*

rights, since man's free will is worthy of respect only as it conforms to the will of God.

§ 113. *Scientific Objections to Free Will.* Aside from the fact that freedom, reduced to free will, scarcely seems a fit foundation for a really absolute right of man to the respect of his fellows, it is also open on its own account to all the objections of scientific and Positivistic minds. How can we admit a free will in contradiction to the laws of science and of nature, by which a universal determinism is presupposed and verified progressively? Such a free will would be at once a mystery of the reason and a scandal of nature. Even from the point of view of pure psychology, how can we prove that at the very moment when we make a resolution, we might resolve to the contrary, since in fact experience shows us only one complete action and not two?[3] Cannot the inner feeling, which the Spiritualists invoke, be explained as an internal optical illusion? Above all, how can we maintain the psychological paradox of the equality of free will in all mankind? If, as Victor Cousin and his successors believe, that is the real foundation of social equality, is not this latter greatly compromised in the light of experience, which shows us so many gradations in the energy of the human will, in self-possession, in moral freedom, and therefore so much actual inequality among supposedly equal personalities? Reduced to such vague generalities about liberty and dignity, the Spiritualistic doctrine cannot satisfy rigorous minds.

§ 114. *The Difficulties Summarized.* Such are some of the principal difficulties to which this doctrine is exposed, to a mere outline of which we have confined ourselves. They may be summed up in the following dilemma: If free will by itself constitutes the right, not to mention the good, since free will is in its nature in-

[3] See "La Liberté et le Déterminisme," 2d edition.

determinate and capable of all contraries, man finds himself right in everything, with a right to everything, whatever he may do, and there is no reason for limiting his free will by his respect for others. I am absolutely free to realize contraries, and you are also absolutely free; why should I place a limit on my action in the interest of yours? Absolute and equal in our inner powers, limited and unequal in our outer forces, we strive together like two absolute kings who find themselves rivals, and the right which prevails is simply that of the stronger. If, on the other hand, free will is esteemed not for its indetermination but for the determination with which it is invested, it is worthy of respect only by reason of a certain good which is at once its object and the object of other men. It is hence this object only which is absolutely sacred and worthy of respect, this alone which constitutes law; the free will of man can no longer be respected for itself, but only as it contributes to a realization of the good. How, then, can we still maintain that man has rights by virtue of his being man and of his being free? We can no longer say that by himself man has any right. Since free will is only a means which often turns against its object, it can be legitimately guided to its end by any path, as is taught, indeed, by the Catholic and authoritarian schools: the end will justify the means. One can and should restrict his freedom when necessary to his own good or to the good of others, without conceding to it the prerogative of absolute respect which Spiritualism claims for it under the name of law.

In short, either free will is indetermination pure and simple, and on that ground absolutely worthy of respect, in which case every action is good and just, and there is no such thing as morality or law; or else free will bows to a higher mandate which must determine its direction,

in which case it may choose evil and cannot deserve our absolute respect.

§ 115. *The Error of Complete Renunciation of Free Will.* Thus the idea of freedom commonly held by the Spiritualist school seems more fitted to suppress the law admitted by them than to establish it. On the other hand, the absolute fatalism of the Positivists is scarcely reconcilable with the idea of "rights of man." We have seen with what logical acumen Auguste Comte rejected both the idea of legal right and the idea of cause. If, indeed, a being is fatally ruled by forces foreign to himself, with no active or causal participation by his personality, without his being himself in any measure a force or a factor in his own destiny, this being rises and falls passively in the moral medium, higher or lower according to a rule analagous to the principle of Archimedes, as a body rises or falls in the air according to the expansive force which sustains it. It is difficult to see what he would have in himself to give him a worth of his own, what that could impart "dignity" to him or confer upon him a personal right. So understood, the human will loses the intrinsic value commonly ascribed to it; the social problem becomes a complex calculation of forces and interests, and the conception of law is reduced in all particulars to a mere metaphysical or theological "illusion."

§ 116. *Contradictory Views to be Reconciled.* Thus the study of the foundations of law brings us finally to a kind of antinomy. On the one hand we do not see how a being without any kind of moral freedom can have rights properly so-called; on the other, we do not see how freedom, at least as it is ordinarily understood by the Spiritualist school, can confer any rights. Hence if the philosophy of "moral law" is to be maintained, in so far as it is plausible, against adverse doctrines, it must

explain more precisely what it means by freedom, and must find a conception of it distinct from indifference of will and from fatalistic necessity.

§ 117. *The Subject Further Outlined.* We are thus led to examine three closely related questions. First, Is the law which is founded on moral freedom a *reality* and truly a "natural" law? Second, If it is not a reality, is it at least an ideal? Third, If it is an ideal, is it *realizable*? We shall inquire later whether the doctrine of ideal law, when it is once rectified and taken in a more scientific as well as a more metaphysical sense, may not be reconciled with that which is true in the doctrines of higher power and higher interest.

CHAPTER II

THE TRUE SIDE OF NATURALISM — CRITIQUE OF THE CONCEPTION OF LAW AS SOMETHING IN THE ORDER OF NATURE

SPIRITUALISM AN INCONSISTENT DOCTRINE — THE BASIS OF NATURAL LAW — THE IMMEASURABLE QUALITY OF NATURAL RIGHTS — NATURAL RIGHTS ARE NOT REAL, BUT IDEAL — NATURAL RIGHTS TRACED BACK TO MORAL FREEDOM — IS NATURALISM ADEQUATE FOR OUR PHILOSOPHY OF LAW?

§ 118. *Spiritualism an Inconsistent Doctrine.* Notwithstanding the stress which traditional Spiritualism has often laid upon common sense, its view of law is so far from common that it is even paradoxical on more than one point. Basing what it calls *natural* law on an "absolute respect for free will," it exalts the human being to a rank conferred upon him by no other doctrine. What it precisely fails to do is to justify this act in the name of that *nature* which it invokes.

§ 119. *The Basis of Natural Law.* The jurists of former times were wont to say of their sovereign — king, emperor, or god — "He is the living law." According to Spiritualism they ought now to say of any and every man, "He is the living right." Herein Spiritualism is inspired by Kant; he, on the other hand, merely paraphrased Rousseau and the French Revolution when he said, "Man is an end in himself." Man must indeed hold this high place in nature, say the Spiritualists, for it is only thus that his "inviolability" can be realized:

a being is inviolable only as his *nature* is opposed to his being made, either by ruse or violence, to serve as an instrument for an ulterior end. Thus only can man be really entitled to "respect"; for respect is a sentiment aroused in us by the idea of one who by his very nature cannot be subjected to a higher power, and so remains master of himself. The philosophers and the legislators of the French Revolution distinguished more or less clearly these features of "*natural*" law, with the consequences which they entailed, and this is why they taught that natural rights are absolute and inalienable. A natural right which could be alienated or annulled to the advantage of some higher principle would have been, in their eyes, only a provisional and conditional right, a permission or a tolerance, in short a favor. Mirabeau wished to banish the very word "tolerance" from the vocabulary of law, and was indignant (not without reason) at the endless discussion of "religious tolerance," since the favor granted one day might be withdrawn the next. The idea of a tolerated right is as self-contradictory as that of "conceded liberties," from which, moreover, it is scarcely to be distinguished. The charter of conscience and nature should not be the gift of a sovereign, but the natural property of every man.

§ 120. *The Immeasurable Quality of Natural Rights.* Thus we see that natural rights, with all the attributes which the Spiritualists attach to them, are something incomparable in nature, and consequently priceless and inestimable. Suppose that we have on one side of the symbolic scales of justice an individual, armed with what to the Spiritualistic school is one of his most obvious natural rights, that of not being put to death if he has committed no crime: if that is truly a right from the point of view of nature, and not merely a matter of

tolerance or a factitious privilege, it will be vain to heap up in the opposite scale forces and interests — the forces and the interests of two men, of a hundred men, of forty million men — so long as you do not put into the second scale the idea of another natural right equal to the first. Whatever the weight of your forces and your interests, the balance of justice will remain steady, immovable, fixed by the natural right of a single being against the forces and the interests of all. Nothing which can be valued mathematically can be equivalent to the idea of rights as expressed by the philosophy which sprang from the French Revolution — rights which, if they exist at all, are absolute, and superior to any quantitative measurement, but which it nevertheless calls *natural*. If we could be sure that we had by nature a right of this description within us, we should be sure that we bore within our consciences a power incommensurable with any other, and which could find its counterpoise only in another right naturally equal to itself.

§ 121. *Natural Rights are not Real, but Ideal.* Thus understood, is a right a *reality* or an ideal, and does it deserve the name of *natural* right which has been given it? There are many opposing reasons. To raise the actual *nature* of man above all possible comparison with any forces or interests, however great, is to attribute to him nothing less than a kind of real infinity; but infinity is to us an idea, not a reality of experience observable in the order of nature. To confer upon man, in the name of his *nature*, unconditional independence and inviolability so long as his will does not encroach upon that of others, is rightly or wrongly to give to him a character of the absolute; but again, the absolute is to us not a natural reality, but an idea. Moreover, to have a genuine natural right, man must be not only

an *end*, but also, as Auguste Comte saw very clearly, a self-acting *cause*; now these ideas of end and cause are most difficult to establish in the order of nature—they resemble the horizon line which the child ever hopes to reach but which flees before him as he advances. It has been said that the cause truly endowed with initiative is free will; according to Pascal, this is what naturally gives to man "the dignity of causality." But as we have shown in the preceding chapter, free will is reduced, psychologically and *naturally*, to a play of motives in which indeterminateness is only apparent, and in which determinateness is real. Indetermination is, like chance, a word with which we cover our ignorance of natural determinism. As to freedom, understood in a wider sense as the independence of man in his actions, where shall we lay hold of it in *fact*, where demonstrate it as a *reality*? Is it anything other than an idea, an *ideal*? Is the *ego* itself, the individuality, the personality, the final basis of natural rights according to the Spiritualists, anything else *in experience* than a simple form of consciousness, an aspect which we present to ourselves, an idea which constantly accompanies all our other ideas and in which these come together, like light rays in certain mirrors, in a purely potential focus? An absolutely simple individuality, absolutely identical with itself, is unrealizable in *nature*. Here again, the absolute eludes our grasp as a *reality*; we conceive it by reflection, we cannot lay hold of it in experience.—This is the strong side of naturalism, and these are the serious objections which it can bring, from its point of view, against the reality of a right which is both absolute and natural.

§ 122. *Natural Rights Traced Back to Moral Freedom.* We believe, then, that the Spiritualist philosophy errs in regarding a right as a natural, actual thing, as, in a sense, a fact of inner experience. Undoubtedly natural-

ism cannot positively prove that there is nothing in man beyond pure phenomena and their succession according to the uniformities of nature, for that is an assertion concerning objects outside the bounds of positive experience; but neither can Spiritualism prove that this something beyond exists. Even if it does, it forms no part of the *natural* order, properly so-called, subject, as that is, to mechanical principles. The door stands open here to metaphysical hypotheses; but as we must not confuse hypotheses with facts, exactness requires that we give to each thing its true character. So we must say that an absolute *natural* right, involving absolute respect, is really based on the *ideal* attributes of man, which, from the scientific point of view, are wholly hypothetical, — on pure ideas to which the thought of man may rise, but whose positive reality it cannot verify. And all these ideas, like geometrical forms which are reducible to elementary figures, are at bottom no more than diverse forms of the one ideal of moral freedom, without which there would be neither any real *ego*, nor any individuality, nor true, infinite, or absolute causality, and therefore no absolute inviolability nor any right properly so-called. Now freedom is so far from *nature* that it seems the very opposite. Kantian morality implies a mode of existence and of metaphysical activity which does not seem a *natural* mode, physical or psychical. An *absolute right*, consequently, cannot be natural, nor can it be founded on nature as observable by man, nor on such of its characters as are scientifically determinable. From the standpoint of pure nature and of pure positive science, combinations of forces and interests, transformations of egoistic or altruistic instincts, and evolutions of the individual or social organism may be invoked, but nothing that is in and of itself inviolable.

§ 123. *Is Naturalism Adequate for our Philosophy of Law?* Shall it be said that we must simply accept in our philosophy of law, a pure naturalism, which denies the existence of any veritable right, even ideal or metaphysical? We have just seen, beyond a doubt, that such a system expresses a part of the truth, but is it the complete truth? It affords a firm *scientific* foundation for the *philosophical* edifice, but may not the edifice itself rise into loftier regions?

CHAPTER III

THE TRUE SIDE OF IDEALISM — LAW CONCEIVED AS BELONGING TO THE IDEAL ORDER

ESSENTIAL RELATIONS OF NATURALISM AND IDEALISM — THE DEPENDENCE OF THE PRACTICAL ON THE IDEAL — EXTERNAL FREEDOM — INTERNAL FREEDOM — THE WILL AS THE SOURCE OF MORAL GOOD — MORAL FREEDOM IDENTIFIED AS THE WILL — THE OBJECT OF TRUE LIBERTY IS NOT EVIL, BUT GOOD — INTERRELATION OF RIGHTS AND FREEDOM — AN UNSOLVED PROBLEM.

§ 124. *Essential Relations of Naturalism and Idealism.* The exclusively materialistic type of naturalism would dispense with ideas of freedom, personality, right, and inviolability, showing by reasons more or less analogous to the foregoing that they do not express either observable facts or natural laws; yet if these things do not exist as realities in nature, they have none the less from the very first an existence as ideas in our minds, a mode of existence which can scarcely be set aside as of no value. No, ideas are thoughts, and thoughts are not unimportant factors which we may disregard, particularly when they are those that dominate and control mankind. For a crude materialism, everything which is not a *reality* is for that reason a mere chimera; but, we may reply, what is not a reality may be an *ideal*. A chimera is sterile, like those monsters which, although they were born themselves, cannot

bring forth progeny; the ideal is fecund, like those creative conceptions of the poet, the artist, or the philosopher, which can give rise to a new world of ideas, feelings, and desires. The chimera cannot be realized; the ideal is progressively capable of realization. The one is opposed to nature, the other in accord with it; the one is false, the other true. The domain of ideas is the legitimate sphere of idealism, which by no means excludes naturalism, rightly understood, but which finishes and completes it, just as thought does not exclude matter, but illumines, penetrates, and transforms it. So we must build up a kind of idealism on the very foundations of naturalism, and strive to unite the two; and we shall not go beyond the bounds of true naturalism in so doing. To study ideas is to analyze the forms of human thought, to determine its essential directions, and to discover the laws of its evolution; thought, too, is a part of nature, even though thought reaches beyond nature, or rather, rises above it to the conception of a higher nature.

§ 125. *The Dependence of the Practical on the Ideal.* Social and political science, more than any other, ought to take account of the ideal, both in its principles and in its applications. Social science, to be sure, tends toward practice, but there is nothing practical without the ideal; an intelligent being cannot do anything without asking himself what better thing he might do. Furthermore, the value of practice depends on the elevation of the idea. In that way lies the truth; therein lie the strength and the grandeur of French politics and law-giving, judged by their principles if not by their applications. Our nation has always been ambitious to realize the best; it has always wished its laws and its politics to conform to the loftiest ideas that the mind can conceive. While recognizing the excesses of this

tendency, we are not among those who, like Taine, consider it a reproach. A body of civil law, or a political constitution, should be fitted not only to reality, but also to the ideal. This is what the pure naturalists and the historical school ignore in their criticisms, in part just, of our national method. The consideration of the ideal is as indispensable to the jurist and the politician as the study of pure geometry is to the mechanician, even though there may be no such things in nature as a perfect circle, or a perfect triangle, or even a really straight line. Hence a correct method requires us to consider this question: If right and freedom are not real experiences or deductions from *facts*, are they not at least legitimate ideals? In other words, does not the perfection of society consist in the realization of all possible good through the voluntary efforts of its members, and should not each individual will for that reason be allowed the *outer and inner freedom* which constitutes the *right*?

§ 126. *External Freedom.* Let us consider first external freedom. It is certain that whatever good is realized voluntarily, without external constraint, is in all respects superior to that realized under compulsion. The reasons for this are numerous. In the first place, there is its greater intensity; it is a power which no resistance weakens, like a river whose bed and banks, instead of obstructing its course, lead its waters onward by an irresistible downward slope. It is also more lasting. Are not the things that a sudden spring meets, lessening the duration of its flight, obstacles like the resistance of the air to the motion of a projectile? Every compulsion has only a temporary and provisory character; it exhausts itself in the long run because it acts from without, while will acts from within. It is this which causes the final impotence of all despotisms. Perpetual

motion is sought in the social order, as it has been sought in the physical; but what is a chimera for our lifeless mechanisms is realized in life. There is perpetual motion in that power which Rousseau made the ideal principle of all human association and the motive force of all human progress, namely, the will; for the will, convinced, persuaded, and captivated by its object, persists, as long as it endures, in that activity in which it finds its complete satisfaction.—To intensity and duration we may add a third characteristic, *variety* of effect; that is, richness and fecundity. External constraint is a uniform force, applied always at the same point; the will, on the contrary, is complex and diversified, because it is perfectible and grows in all directions. Furthermore, if voluntary good is superior to the others in *quantity*, it is no less so in *quality*, because it alone is conscious, felt, and loved. A good of which we were unconscious would not exist *for us*, and would be therefore inferior. The freedom conceded to the will creates conscience; constraint, on the contrary, exercised on the body tends to give nature predominance over thought. Hence French philosophy has been right in representing written law, a formula of the general good, as necessarily an expression of the general conscience. A nation worthy of the name is a voluntary union of consciences, not a forced aggregation of blind and passive creatures. Let us add that voluntary good, desired by all, is also the only kind which may be loved by all. Do we enjoy what we endure in spite of ourselves? Do we like the violence which binds our members but does not bind the heart? Voluntary good alone, in short, produces happiness; we are happy only when we have that which we love. Happiness is something not passively endured, which may come from without, and enter into us in spite of ourselves, like a liquid poured into a vessel; if the

vessel is bitter, it renders bitter the sweetest cordial. To make a man or a nation happy against the will of either is a contradiction and a chimera, too often reproduced in antiquity and in our own day by the authoritarians and the theologians, by all those who would be our saviors against our will. From the standpoint of naturalism, the most perfect machine is one which always has its own motive power within itself, which has the least need of the continual intervention of the operator, which can even dispense with him altogether, which can run itself, repair itself, reconstruct itself, adapt itself spontaneously to its environment, and perfect itself by its own inner energy. Such is the ideal which human society should pursue. The naturalists should realize, as well as the idealists, that the good which society imposes by compulsion is a lifeless good, while that which springs up within the bosom of the individual is a living good. True *evolution*, with intelligent beings, should go on within, should not be effected by external means which produce only the superficial and the apparent. The worthiest man is he who bears within himself, so far as possible, the principle of his own evolution, the warrant of his own worth; and the same is true of the worthiest society.

§ 127. *Internal Freedom.* After having thus established the superiority of the good which is attained without compulsion, we have a second step to take, a second premise to lay down. Is it enough that the will should be independent *externally*, and exempt from all outward pressure? If it is to approximate the ideal, must it not be also internally independent? Now complete inward independence would be what we know as *freedom*. Spiritualistic philosophy, in the last analysis, rests its idea of rights on this inner moral freedom, of which external freedom is, in its view, only the mani-

festation and the guaranty. But here again, is this a just conception of the ideal?

§ 128. *The Will as the Source of Moral Good.* We feel that it is necessary to concede at the outset, to the partisans of freedom, that if the will of man should attain to "moral freedom," or at least approximate it as closely as possible, the individual would have within himself a higher and more personal value; we could justly attribute to this his inner perfection and his good will towards others, or, in a word, the good of which he was himself the author. Perfection derived from others is the perfection of those others, who alone deserve the credit for it. The beauty of a work of art belongs to the artist, and it is in his thought that the true beauty dwells, of which the other is only the lifeless image. Any work is valuable only according to its form; the fundamental value is in the worker only. It is an abuse of language to attribute goodness to material things which are subject to inexorable laws. A crystal is symmetrical, regular, unvarying; it is not *good*. It is the will which makes things good properly speaking — that is, morally good. Without this, there is the agreeable, the true — formal beauty, perhaps — but not real goodness. This is what constitutes the absurdity of the authoritarian systems that affirm a *moral good* imposed by authority — a contradiction in terms.

§ 129. *Ideal Freedom Identified as the Will.* But it is important to have a precise conception of this ideal of freedom which, if realized, would be the crowning achievement of human nature and the consecration of our right to respect and love. Now, as we have seen, believers in a freedom of indifference which acts without motives, or in what amounts to the same thing, the popular notion of a free will which acts contrary to motives or arbitrarily creates them for itself, cannot

base thereon a theory of rights satisfactory to the scientific mind. This indeterminate free will, apart from the fact that it is not demonstrable, could not constitute the highest *ideal* of the will, and consequently not the highest *worth* of man, the principle of his rights. Moreover, absolute materialism and fatalism, in suppressing every action of the individual, in explaining everything from without and nothing from within, end in suppressing activity itself, and leave no personal worth to the individual. Hence we should conceive ideal freedom as superior both to fatality and to indeterminateness. As we see it, this ideal liberty does not consist in an equal power to will things opposite, does not bring into life and into history, along with an ambiguous possibility of contraries, an element of inexplicable chance. Neither, on the other hand, does it admit, as the fatalists do, the complete passivity of every being; for it attributes to the being an action of his own, an essential tendency which characterizes him, a spontaneous force which is the measure of his worth. How, then, shall we conceive this force? As a kind of miracle of nature, or rather, outside of nature? Can we not form an idea of it consistent with the determinism of nature itself? Without entering here upon too long a discussion, let us merely say that the meaning of the word "liberty" has been diverted from its early etymology by metaphysicians and theologians. "Liberty" signifies *independence*. Now the Schoolmen and the modern psychologists have limited it to free will, properly so-called — to the power of realizing contraries, which, if it be such as they imagine it, would be only a special form of freedom, and, as Descartes said, its lowest degree. But free will, apparent or real, is valuable to us only as it enables us to enlarge our independence; and it is precisely independence which, to our mind, constitutes true liberty. Negatively

taken, the word "liberty" means the *absence of all external constraint*; positively, it means in the first place the presence of a self-acting force, the plenitude of spontaneous, conscious activity, in short the will; hence ideal freedom ought to be primarily defined as independent will, that is, will dependent upon itself alone.

§ 130. *The Object of True Liberty is Not Evil, but Good.* We have yet to learn in what this independence consists. As commonly understood, free will is independent of all persuasive motives, can act contrarily to such motives, and can suddenly create for itself a motive not arising from the laws of the mind. But is capacity to act uninfluenced by any motive what really concerns us? No, independence of all motive can at most be only apparent, and would at any rate be useless. There is always, in fact, a hidden motive which explains our decision, an intellectual or emotional determinism; and even if there were no motive, an arbitrary and inexplicable decision would be without value, either moral or social. What, then, is the truly precious thing? It is independence of *inferior* and *external* motives, of egoistic and material motives; for these motives express not the normal, essential direction of the rational will, but a deviation caused by fatalities of external origin — they are servitudes. True liberty, therefore, does not consist essentially and ideally in power to do evil, but in power to do good; its essence is not an ability to fall, but the ability to rise. The first of these powers is not necessarily and in everyone a condition of the second, despite the common prejudice which conceives these things only as contrasted; for evil may be the result of external compulsions, of physical servitudes, necessities, passions, et cetera, while good may be the mere release of our true and proper activities, at once kindly and intelligent. In doing evil, the will would

do that which it did not really wish; in doing good, it would do what it really preferred, what is preferred by other wills, by the *universe*; and that would be a deliverance. Thus we can construct the notion of an ideal freedom, of a *universal will*, which would be neither unmitigated determinism nor the vulgar freedom of indetermination.[1]

§ 131. *Interrelation of Rights and Freedom.* It is this ideal freedom which is frequently confounded with ideal right. Indeed, the being who had rights in the fullest sense of the word would be the being who depended only on himself and by that very circumstance would be able to do as he liked in regard to others. This is, indeed, quite the common view. When we wish to assert our rights, we say, "I depend on no one but myself." Right, independence, liberty, are then diverse expressions of the same idea, and as this idea exists, more or less vaguely, in all minds, we must recognize that it has value at least as a supreme object and ideal of human thought.

[1] The popular notion of free will implies that, in some way or at some point, the will is indeterminate. A freedom reconcilable with science, on the other hand, would involve a determination of the will, becoming more and more marked and more and more certain, a determination to higher and higher ends (family, country, humanity, the universe), to motives more and more nearly universal, over which narrow, egoistic motives would less and less be able to prevail. The free man is one upon whom we can rely more and more, and with increasing confidence. It is impossible to reconcile vulgar free will with scientific determinism; in our theory, on the other hand, we give determinism its legitimate place, and even treat it, as will presently be seen, as a means of emancipation and progress. But, it may be asked, how could freedom be reconciled with a determination of increasing strength in a given direction? This objection comes from thinking of determination as essentially *passive*, the product always of an *external* force; but the true determination could be active, produced by an *internal*, intelligent force, which would surmount obstacles, would become more and more self-conscious, and would dominate all else. In this case the will would be determined only by its own spontaneity. Now it is *self-determination* which constitutes the ideal liberty; to depend on oneself alone is to be independent. However, we repeat, this is only an ideal.

It has a value, indeed, in all its possible forms, and in all stages of its possible development. The ideal form of liberty is the free desire for the *universal* as felt by the *individual*, who, although wholly self-dependent, would nevertheless devote himself to the good of all. This ideal is evidently the highest end of man and the supreme object of human desire. As a means to its attainment, we conceive a power not yet wholly free, capable, consequently, of contraries, of movement in two different directions, one disinterested, the other egoistic. This second kind of freedom is not, in itself, essential to the first, since we think of the divine ideal as both absolutely free and absolutely incapable of decline. The power to do wrong is nevertheless the actual, inferior form in which the freedom to do right realizes itself. As the universal will, which is the good, can come only from within the being himself, and not from without, it follows that the spontaneous evolution of freedom, with the power to do ill together with the power to do good, is the practical form of rights among men, at once fallible and perfectible as they are.

§ 132. *An Unsolved Problem.* This granted, what more is there to say? We must inquire whether freedom as thus understood, and the ideal right derived from it, are condemned as sterile ideals lost in the imaginary void, as inactive and as impotent on earth as the gods of Epicurus, or whether they may be realized more or less completely. The problem which we have now to solve is, therefore, to find an effective and *observable* bond of union between idealism and naturalism, such that the ideal may descend into nature itself, transform it to its own image, and lift it up to itself.

CHAPTER IV

SCIENTIFIC RECONCILIATION OF NATURALISM AND IDEALISM BY MEANS OF THE FORCE-IDEA OF RIGHT

THE FORCE-IDEA DEFINED — THE SELF-REALIZATION OF DESIRE — THE BASIS OF RIGHT IN A UNIVERSAL END — LIMITATIONS OF SPIRITUALISM AND NATURALISM — GROUND GAINED FROM THE NATURALISTS — THE BASIS OF THE THEORY LAID DOWN — THREE PHASES IN THE EVOLUTION OF FREEDOM — INFINITY OF THE IDEAL OF RIGHT — RESPECT FOR THE IDEAL OF RIGHT IS DUE TO ITS PROGRESSIVITY — MAN'S IDEA OF THE RIGHT A BASIS FOR PRACTICAL RIGHTS.

§ 133. *The Force-Idea Defined.* The link between naturalism and idealism, the means by which the ideal is made real, we believe to be *evolution*, which being here conscious, and mindful of a purpose, may be called progress. Only we think of this evolution in a particular way. In our opinion that motive power, too seldom remarked, by which evolution is accomplished, is the influence exercised by the idea itself upon its own realization. Here we are not taking the idea in the metaphysical sense of Hegel; we do not regard it as an indescribable entity impossible for experience to lay hold of, we mean the very ideas which our own intelligence conceives and which are our own thoughts. Every idea which we conceive has an effect upon us, and *tends towards realization by the very fact of its being conceived*: this is our guiding principle. To think of anything, indeed,

is already to set about it; one cannot, for example, have the idea of a movement without producing this same movement in the brain, nor the idea of a melody without mentally singing. Furthermore, there are among ideas some which are superior to all others, which express ideals; such is freedom, and such is right. These ideas are types of action which indicate the most elevated direction human nature may take, the completion and the perfection of our nature; these, accordingly, are the *directive ideas*, the *force-ideas*, intellectual motor agencies and effective centers of attraction.

§ 134. *The Self-Realization of Desire.* If this be the case, we must apply to the theory of rights a philosophical doctrine which we have been attempting to present elsewhere for some time, and put to the test its fruitfulness in the social order.[1] When we permit our actions to be guided by the directive idea of freedom, with confidence in the possibility of its realization, we actually perceive its image growing clearer and clearer

[1] "La Liberté et le Déterminisme," 2d part. Human freedom, apart from metaphysicial hypotheses of which we shall speak later, consists practically and scientifically in the power to change oneself by the very idea which we have of this same power and of our possible modifications. If, for example, when emotion is leading me in a given direction, I conceive the idea of changing that direction so as to attain a better end, this idea of my power is the commencement within me of a real power; it is the force of the idea opposed to other forces and capable, through the increasing intensity of its reflection back upon itself, of outweighing other motives to its own advantage or to the advantage of a higher motive. This is all that psychological and physiological experiment finds within us; this is the only free will which *positive* science recognizes, and which *observation* shows to be an incontestable fact. Suppose that the conscious statue of *Condillac*, acquiring the *idea* of, and the *desire* for, a possible modification or perfecting of its features and form, should by that very acquisition acquire the *power* to modify them; it will progress from the thought of its ideal and the desire for it to its final realization. This power of self-modification increases, first, through our being persuaded of its existence, second, through our consciousness of possible modifications and of the means of their realization. In other words, we are the more capable, the better we realize our internal powers and our means of external action; from this point of view, it is knowledge, thought, idea, that give us power.

within us, by virtue of determinism itself. The natural laws of sympathy which operate between individuals, causing tears or laughter, fears or hope, to be transferred from one visage to another, operate also in the breast of the single individual; idea and desire, by a kind of contagion, enter every part of the being and imprint their likeness there. Just as man, according to Platonic thought, came to resemble the object of his contemplation and of his affection, so we come nearer to freedom by dwelling upon it and desiring it — an indefinite approximation, an unlimited evolution which constitutes the moral life. Now just as we gain a self-control the greater as we have the greater and more rational faith in that control, just as we virtually acquire a value the greater as we are better and more rationally persuaded of our own value, so we approach simultaneously the ideal of *right* and the ideal of *freedom*. These are two parallel processes of evolution accomplished in an identical manner under the influence of the idea. To persuade ourselves that we have neither personal independence nor moral right is to be deprived of our inner force, is to turn bondsmen and to renounce our right; to persuade ourselves that we are capable of a certain initiative is to develop within ourselves a constantly increasing energy. And along with this energy, dignity grows likewise, for dignity is the value which an individual possesses as his own, the higher value deriving from personal energy.

§ 135. *The Basis of Right in a Universal End.* There was something altogether too crude and materialistic in believing, in accord with the traditional philosophy, that right is based solely upon some already present and tangible *reality*, which may be established as an empirical *fact*. Why may not an ideal and *intelligible end* that one has in view serve also as an *intelligible* basis of right?

Ideal freedom, conceived as an ideal power of disinterestedness looking toward the *universal*, is precisely that intelligible end, an end for each and every individual; that ideal includes me, as well as you, in what it embraces. It is a potential focus whither all wills tend, and where all wills converge. Now, even from this purely idealistic point of view, the faculty of conceiving the universal and of willing *universally* comes to merit a respect which is also universal, by virtue of its normal *goal*, even though it should not actually pursue this goal at all times.[2] Thus an *idea*, a pure idea, can begin to confer something of its worth upon us from the very moment of its conception, and if the value of this idea is not particular, if the idea contains a conception of the universal, the value of the will which it guides or directs will itself come to be of an altogether different kind from egoistic interests or egoistic forces. Once more, the ideal as such forms from the beginning an element of higher dignity in the individual who *conceives* it, who *cherishes* it, and who *trusts* in it. From the moment when we have conceived and cherished ideal and disinterested freedom, from the moment when we have hoped for its realization in ourselves, we feel unwilling to be looked upon any longer as a mere *thing*; rather, we would be a living thought, conceiving the universe, a *consciousness*, an *intellect*, a *will* capable of willing for others as well as for itself, capable, in short, of willing for the universe. It is useless to say that perhaps we do not really possess such freedom; from the purely philosophical point of view, it is enough that we really do conceive it and draw nearer to it; just as all that the prisoner needs is to have glimpsed the free heavens and a possible avenue of escape, in order to preserve an indelible recollection of them — in order to see himself already a free man — in order that

[2] We shall return to this point later.

this one hope of freedom should possess within itself a principle of inviolability. Everything depends, indeed, on the object of one's hopes; if this object is essentially divine, that is to say, if at heart it is essentially human, typically social, and it does not gainsay other objects of human desire, then even this *hope* becomes *divine* and commands respect from every member of the human society. It has beeen said that sorrow is sacred: we might more fittingly speak of the sacredness of hope. This is what gives, in practice, so great an influence to even the mere idea of right. He who is not ready to maintain his own ideal right identical with the right of all, persistently to affirm his idea and his hope in the face of brute fact, and thus to uphold, in upholding his own will and dignity, the dignity of his universal object — such an individual sacrifices at once his moral rights and his moral force, he becomes his own betrayer. And this which is true of the individual is no less true of the nation.

§ 136. *Limitations of Spiritualism and Naturalism.* This idealism is ignored by Spiritualism and naturalism alike; these two doctrines, the one popular, the other exclusive, unite in a certain disdain for whatever is pure idea. The Spiritualistic school conceives the ideal only as an immediate reality, as something already achieved in a transcendent world. The naturalistic and historical school, on the other hand, would have us depend wholly on our past and on the predetermined course of phenomena. Taine declares, for example, that for constitutions and legal systems "it would be in vain to indicate our preferences; history and nature have chosen for us in advance; it is for us to accommodate ourselves to them, for they will not accommodate themselves to us; the social and political form which a nation may adopt and retain is not left to arbitrary choice, but is

determined by its character and its past."[3] We hear endless talk of the past, in the historical school, and no heed is given to the future. Now, it is with the future in mind that we think of ourselves as capable of increasing *activity*, and therefore of increasing *worth*. A right is no more nor less than an idea turned toward the future; it is, so to speak, respect for the future in the present; perhaps, also, respect for that which is above all considerations of time. What would we say of a man who, having to choose between a righteous life and an unrighteous one, would apply this argument to himself: "Nature chose for me in advance, the course of life which is open to me is determined by my character and my past; up to this day I have been unrighteous, I have consequently to remain faithful to my historical character"? Those who revive this argument of "indolent sophism" neglect the essential element of the problem, which we have just established; they forget that *idea* itself operates to transform *nature*, to produce the *future*, that history is enacted with our aid, not without it, and that it is history which in the end must do the accommodating. Good lawgiving and good politics are like good warfare; victories do not come of themselves, and if the Turks were as thorough fatalists as they are reputed to be they would not have won at Plevna. The words of Taine serve as an illustration of the famous expression, "Constitutions are not made, they grow"; and the reply might be made to him, as to Burke and Krause, that men do not waken in the morning to find constitutions full-grown; these are not like the trees which, once planted, keep on growing while men sleep, for they are the handiwork of men themselves. Moreover, the fecund germ is here not an exterior force, but an interior idea which, as soon as it is conceived, begins to develop and to gain vitality.

[3] "L'Ancien Régime," preface.

§ 137. *Ground Gained from the Naturalists.* In our opinion, therefore, the naturalists will finally have to agree with the idealists that no individual or no nation can be too keenly conscious of a capacity for *progress* toward the ideal, of an interior reserve of available strength upon which to build the future, and consequently of an increasing worth which can be acquired by effort.

Besides this first point, the naturalists will also have to concede a second; if there are limits to this perfectible energy which constitutes the worth of men and of nations, these limits are at least unknown to us, and in practice can be indefinitely extended; for who can determine beforehand the bounds of human activity, and say that it shall go no further? No one, consequently, can bespeak for any man or aggregation of men a fixed material valuation, a *limit value*, so to speak. Moreover, it is right that these boundaries should be at the furthest possible remove. The naturalists will have to agree, then, that the closest conformity to the ideal of our nature, as well as of our rights, will be obtained by accumulating and storing away within us the greatest amount possible of personal energy, of latent promise, which the social order will naturally serve not to repress, but to release.

§ 138. *The Basis of the Theory Laid Down.* Thus we begin the theory of rights, like the theory of ethics, with a pure idea, whose consequences and means of realization we analyze scientifically, reserving metaphysical criticism for a later occasion, and the fundamental idea of rights is, in our belief, the same as that of morals: the ideal of a free, unbiased will, that is, a will *capable of being progressively independent of all narrow and inferior motives.* The geometrician presupposes the notion of space, the physicist that of matter;

similarly the sociologist has to presuppose, as the goal of social science, the ideal of both personal and impersonal freedom, as we have defined it. Thus, we possess as the basic principles of our doctrine two things which have a positive scientific value, two things which no system can deny nor refuse to let us hold, an *idea* and a *fact* — the idea of freedom, and the fact that freedom tends to realize itself, and by degrees our rights also, within us. As the idea itself is a fact, we can say (independently of the metaphysical considerations which we shall presently come to) that we take as a scientific point of departure two facts equally positive and susceptible of experimental verification, a thought and an action. Furthermore, we have a real connection between thought and action: namely, *progress*, by which thought transforms action itself, and which constitutes what we may call practical or progressive freedom.

§ 139. *Three Phases in the Evolution of Freedom.* Let us now, without departing again from the purely scientific and experimental domain, trace briefly the principal stages in the evolution of freedom, which has its parallel in the evolution of law. We shall thus perceive by what degrees the feeling of right is actually developed in the human consciousness.

Man first conceives of the independence of the will in relation to *some* special motive, some particular end, fear, for example, or cupidity; and indeed, thanks to the idea itself of our independence, which suspends our decision and makes us regard two contraries as possible, we become really capable of opposing one motive to another, of triumphing over one motive by means of another, or over several by means of all. This influence exerted by the idea constitutes the only possible *free will*, one which does not exclude the *determinism* of which it is a form, but which renders this determinism more

flexible, better suited to the realization of contrary effects, and consequently more progressive. Thus regarded, free will is the first means by which we become cognizant of our new-born independence, of our nascent rights. The child tries to assert his rights by doing exactly the contrary of what he is commanded to do, so that he may give himself a view of the power which he holds or thinks that he holds over contraries, of his legislative and executive power.— In the second place, we may show ourselves independent of *all* motives at once (apparently so, at any rate), and may act indifferently, without visible reason; but even while we thus appear to will without reason, there is still a final reason which persists, and turns the scale by a hidden determinism, namely, the idea itself that we can act regardless of reason. We are all familiar with those toys which when laid in a horizontal position, spring upright of themselves, without any visible cause; a ball of lead concealed in the base, heavier than all the rest, is enough to draw them over and to determine their position. Thus is produced the apparent *freedom of indifference*, the seeming indeterminateness, the caprice, which is in fact nothing more than a form of determinism. Man thinks that he sees in this also a second means of affirming his rights: "Sic volo, sic jubeo, sit pro ratione voluntas"; this is a kind of arbitrary despotism which is a delight to children because they find in it a ready means of displaying their autonomy, of creating in their own minds the illusion of a kind of absolute, royal right.— In the third place, we may act independently of every *particular* motive and of every *limited* or material aim, we may place our goal beyond all confines, we may will universally, we may desire the good of all humanity and of all the world; this constitutes *morality*, which, again, is not the absence of all motive, but the prepon-

derance of the universal, disinterested motive. This preponderance indicates the return of the will to its own, its complete and virile self-possession, consequently its true *freedom*. Here, too, we find the highest consciousness of *the right*; it is the point where our personal independence seems to be linked with the independence of all other beings, where our right appears to have its complement and even its rational condition of existence in the rights of all. A right is, in one sense, a higher form of self-love, but only as that love is compatible with an equal love of others for themselves; it is the highest instinct of conservation and particularly of development, but it is also the instinct of disinterestedness, for in that lofty realm true moral interests become merged, and the dignity of one calls for the dignity of all. Such are the three principal phases by which we obtain, in practical life and in the scientific order, a gradual approximation to ideal freedom. [4]

[4] The only *practical* freedom compatible with *science*, in our opinion, is that internal power of development which can move steadily forward in the direction of the ideal, not by miraculous means, but by natural and intellectual means which constitute in themselves a determinism. What man is, in practice, physically free? It is he who can advance without stopping, who has space before him, with no bonds to stay him permanently at any point. What man is, in practice, morally free? It is he whose will may develop continuously, surmounting in succession all incentives, all motives, and all special ends. In this conception, naturalism and idealism approach each other and unite. Indeed, our inclination to freedom is operative in the heart of nature and the bosom of society, and not in a world of "noumena" like that of *Kant*. As a psychological tendency, it is not transcendent, but immanent, even when its object seems to be, in a sense, transcendent. It is not essentially distinct from intelligence itself, nor from reflection, which is its conscious form and manifestation. It acts through the idea; it is itself an idea in process of development; and lastly, since it finds its motive power in consciousness of self, it is its own motive power. Everything develops, and the whole world evolves. To comprehend this universal principle, and, through reflection, to aid in its realization round about us, within us and through us,—this is our privilege. It is this power to develop all of our faculties by reflection, to become all that we can become, gradually to fulfill our ideal of individual independence and of union with the universality of beings, which constitutes our practical and progressive freedom.

§ 140. *Infinity of the Ideal of Right.* At the same time this internal evolution which we have just described provides us, better than anything else, with the qualities necessary to the *realization* of the idea of right. In the first place a right implies independent *power*, the ability to make use of what is and to create what is not, to act, to work, to develop. To have a right is to have a right to something; the idea of right, as we have seen, invokes the idea of the future; right might almost be defined as access to the future. Consequently, right presupposes *progressivity*. Now we have just seen that practical freedom is a power eminently progressive; we conceive it, in fact, as a power which is not exhausted by its activities, which always can do more than it does, and which holds more than it gives out. Such a fecund and inexhaustible genius continually adds to its original achievements new, larger, mightier works, more like itself, though still powerless to express the infinity of its ideal. This is the source of rights.[5] If I had but a *fixed* value which, by approximation, might be estimated quantitatively at such and such a *figure*, it would be easy to find material possessions which would prove me inferior, in the name of which anything would be permitted against me. What could a single will do against the interest of a nation? Even though exact figures in the social budget could not express the value of an individual and of a nation, it might nevertheless be

[5] When we say that freedom and its progress include the idea of the infinite, we take the word "infinite" not in a metaphorical, but in a truly scientific sense. In mathematics, we call that infinite which is greater than any given quantity. This infinity may be a variable; it is not necessary that it should be fixed and determinate in all of its relations. Similarly, practical freedom may be a variable, constantly moving towards perfection, traveling, as it were, eternally forward on a limitless course. If this be true, the will may justly be called infinite, that is, surpassing, in its ever active and ever moving essence, every set limit, every fixed and lifeless measure, such as number. By the same token its inmost value would be incommensurable.

affirmed that the interest of the people in the aggregate represents, in quantity, a greater value than does the isolated individual. But if we are conscious of a faculty for evolution and for unlimited improvement, if we believe that we have a *genius* (in the old sense of the word) for truth and justice, capable of producing works which are nearer and nearer perfection, our moral value will exceed in our eyes every measurable, material quantity. The Roman general who imagined that he was replacing masterpieces of painting by some equivalent showed that his mind was closed to the idea of the incalculable value of works of art; what should we say if his imagination had conceived some equivalent for the artist himself, and had placed a material valuation upon him as upon a slave?

§ 141. *Respect for the Ideal of Right is Due to its Progressivity.* From what has gone before, we see that the ideas of *right* and *unlimited perfectibility* are intimately related, and that the instinct of the French Revolution, in not separating them, was based on a profound intuition. What one respects in the human being who is endowed with will and reason is not so much what he actually is as what he may be; it is the possible issuing from the actual, the ideal dominating the real. The present is big with the future, said Leibnitz. The reserve of will and of intelligence in the human brain, the faculty for progress in the individual and even in the species (which rests in part upon that brain)—this it is which we respect and which we call the right. In the child we respect the man, in the man we respect humanity and, so to speak, the ideal God. Even in ill will we respect the potential good will.[6]

§ 142. *Man's Idea of the Right a Basis for Practical Rights.* Thus is all humanity ennobled in our eyes, or,

[6] This is a point to which we shall return later.

better said, made as it were divine. If, therefore, our point of view is purely scientific, we should not say, "Man has an inestimable value because he is free"—something which cannot be scientifically proved — still less, "because he is freely good"; but we may say, "Man has already a value which is inestimable, or greater than every given quantity, simply because he possesses the idea of freedom and the idea of unreserved goodness and universal brotherhood, of which the primary condition is justice." In other words, man possesses rights *practically*, solely by virtue of his being a conscious individual with the *idea of right*.

CHAPTER V

METAPHYSICAL HYPOTHESES CONCERNING THE ULTIMATE BASIS OF LAW

THE SPHERE OF METAPHYSICS — THE PROBLEM OF INDIVIDUATION — THE REALM OF THE UNKNOWN AND THE UNKNOWABLE — CHARACTERISTICS OF CONSCIOUSNESS — A METAPHYSICAL FOUNDATION FOR RIGHT — THE METAPHYSICAL FOUNDATION NOT EXCLUSIVE — FURTHER CONSIDERATION OF HUMAN CONSCIOUSNESS — RELATION BETWEEN SELF-INTEREST AND RIGHTS — SCIENCE ENDS WHERE JUSTICE AND RIGHTS BEGIN — OBJECTIVE VALUE OF THE IDEAS OF FREEDOM AND RIGHT.

§ 143. *The Sphere of Metaphysics.* A final question presents itself. We have laid down as principles two things: a wholly ideal freedom and a determinism which is real from the point of view of experience. This determinism, as we have shown, may draw perpetually nearer to its ideal; but can it ever attain to it? Can we, by certain acts which seem to surpass all others in heroism or unselfishness, actually reach the goal? In this subject we can form only hypotheses; and this is the field allotted to metaphysics, considered as systemization of the data of experience or as universal *cosmology*; the preceding questions belonged properly to the scientific order. There are grounds for doubt; there are also grounds for belief. What is really the question? It is the very foundation of things. Do things have a foundation? If they have, is there some primal necessity

within this foundation, which rivets, so to speak, the living being to itself? Is there, on the contrary, some primal freedom from whose spontaneity gushes forth a stream of life? Is it the law of destiny of Heraclitus, the "clinamen" of Epicurus, the substance of Spinoza, the "noumenon" of Kant, the absolute will of Schopenhauer? Let the metaphysicians choose, and their choice can be made only by comparing probabilities, and by drawing inductions from the general conclusions of science and the facts of consciousness.

§ 144. *The Problem of Individuation.* The theory of rights thus brings us finally face to face with the profound problem which stirred the Middle Ages and which still survives in the philosophy of the present day, the problem of individuation. What is it that constitutes the individual and the individual consciousness? What is the ultimate root of that conscious ego in which the idea of right seems to inhere? Is there nothing in our natures except phenomena, or do we strike at some point a more lasting reality, as the plant clings to the soil from which it draws its sap? The part played by the physical and social environment is and will always be immense; organs, temperament, heredity, education, how many influences act upon me! I am the point of contact and intersection of an infinity of circumstances, as though an invisible circle were cut through in every direction by a network of great circles in infinite number — in the midst of whose intersections the eye should seek in vain to distinguish it. But suppose that it had at its living center a power of expansion enabling it to grow steadily larger, and to extend its radii in all directions; perhaps it would become distinguishable in time, and one would find oneself forced to recognize in consciousness the true radiant center of life and even of motion.

§ 145. *The Realm of the Unknown and the Unknowable.* We have not sufficiently considered the moral and juridical consequences which flow from the guiding principle of modern science: the *relativity of science*, the relativity of our knowledge, whence the certain existence of the *unknown* may be deduced as well as the possible existence of the *unknowable*. At first glance, this seems far removed from the idea of right; we shall see, however, that it expresses the ultimate metaphysical foundation of that idea.

But first, what is the true meaning of the unknowable? Perhaps it is a chimera; perhaps everything is or might be the object of positive knowledge. Yet positive knowledge has at least two *limits:* on the one hand, the idea of matter, of motion, of force, of life; on the other, the idea of thought and consciousness. From the point of view of even the most radical Positivism, it may be that thought is not of a nature to penetrate to the foundations of everything; it may be that the brain is not of a nature to speak the last word, if there is a last word, concerning things. Much less can it pronounce the whole eternal discourse concerning them, if this discourse has neither a first word nor a last. The brain may be such that it cannot grasp the innermost meaning of being or of phenomenon, the *objective reality*. A true Positivist, as well as a true Criticist or a true sceptic, should hold in the background of his thought a *What do I know?* and a *perhaps*. He ought at least to say, "*perhaps* things have an unknown foundation, since knowledge properly so-called comprehends only relations and surfaces." He should not assert the adequacy of the brain to reality, the adequacy of science to reality, but only to reality as knowable by us. Even experience teaches us that our brain is not so made as to represent all things always as they are, independent of the brain itself; experience

invites us, therefore, to conceive on the one hand a *totality* of objective things, on the other a *totality* of subjective states, and proposes the problem: Is this totality of subjective thought identical with and adequate to this totality of objective reality? Thus we form an indirect and, so to speak, parabolic conception of something *other* than the knowable, namely, the *non-knowable*, the hypothetical *unknowable*, which might better be called the *irreducible*. When we conceive of the fundamental limitation of the mind and the brain, "alte terminus hærens," we also conceive, by projection and induction, of an obscure *beyond*. Hence the *object* felt or thought of is not conceived as certainly and entirely penetrable by knowledge, penetrable by the thinking and feeling *subject*.

§ 146. *Characteristics of Consciousness*. On the other hand, *perhaps* the subject itself, in its turn, is not completely penetrable by itself. What, *in reality*, is this consciousness which includes itself among the objects of its thought, this consciousness concerning which so many hypotheses have been proposed; which is indivisible for some, for others complex and divisible; which to some is a sealed book, to others open and penetrable; individual according to some, capable according to others of extension to whole societies, to vast, ever-increasing groups, of merging thus with other units of consciousness into one common social consciousness? This is a problem which never has been, and possibly never will be solved, for consciousness is sui generis and incomparable. We cannot classify it under a higher genus, nor can we mark its *essential difference* from other things of the same genus; it lacks the attributes necessary to comprehensibility. Thus, once again, consciousness does not *comprehend* itself; there is, then, at the bottom of the consciousness of the

unknown, and of that which is perhaps irreducible to knowledge, something at least which *for consciousness* is intellectually obscure, even though it be actually *immanent* in its very existence. In a word, the individual and introspective consciousness is not adequate to its own conditions, its own basis, its own content, or its own synthesis. In this, the *psychical* discovers a limit, so to speak, in that continuation of itself which we may call the *matapsychical*; subjective knowledge dashes itself against a wall, against an indescribable something which analysis cannot penetrate, which is doubtless the same as the impenetrable in matter, or the *metaphysical* properly so-called.[1] Thus the common or synthetic basis of the object and the subject is hidden in darkness. We conceive other objects themselves only as other *subjects* more or less analogous to our own consciousness; we conceive *other* consciousnesses: this is, as it were, intellectual altruism, the foundation of all other altruism.

§ 147. *A Metaphysical Foundation for Right.* Now, what is needed for a metaphysical basis of right? A principle which would rationally lead to a certain *abstention* in relation to the conscious will of others, in so far as that conscious will refrains from intruding upon our own. This abstention will be a limit imposed upon the indefinite expansion of our egoism, that is to say, of our material strength and of our palpable interests. Now the principle of the relativity of our knowledge — a corollary of which is the problematical idea of the irreducible, immanent in being and in thought, in short, of ultimate reality — this principle has rationally a

[1] We should not be misled by the words *metaphysical* and *metapsychical* which we have just used; they signify nothing outside the limits of the physical or especially of the psychical, nothing really transcendental, but rather their most *immanent* part, that which constitutes them a reality, even though knowledge cannot grasp it.

limiting effect on action as well as on thought. In limiting intellectual dogmatism, it limits practical dogmatism also; it restrains, in the individual, the *absolute* attachment of the will to tangible possessions, as it curbs the pride of physical and mechanical knowledge. The restraint is still stronger as applied to the egoism of one individual in the presence of another; with the ego no longer the sole consideration, the principle of abstention becomes more important. The idea of the irreducible which thought then attributes to the consciousness of others as well as to our own, is essentially, for our thought, only a *negative* and *limitative* idea: it is thought conceiving its own possible limit; but this limit ends nevertheless in the affirmation of *other* consciousnesses limiting ours: it takes us outside the *ego*. This idea is, by that fact itself, sufficient to justify metaphysically the practical and moral restraint of our will in the presence of other wills, of our consciousness before the consciousnesses of others. To make one's egoism and one's ego absolute is to dogmatize in action as well as in thought; it is to act as though one possessed the absolute formula of being; it is to say that the mechanically knowable world is all, that force is all, that interest is all. Injustice originates in practical dogmatism and in absolutism, λόγῳ καὶ ἔργῳ. Justice, on the contrary, is a mutual limitation of wills and consciousnesses by a single idea equally limitative for all; and by this I mean the idea of limitation itself, which is, first, inherent in our physical knowledge, and so opens the way to *cosmological* speculation; and second, inherent in our consciousness as limited by other consciousnesses, and so leads to *psychological* speculation.[2] To set up the mechanism of forces or of interests as the

[2] For the development of this point of view, see our "Critique des Systèmes de Morale Contemporains."

only law is to affirm that mechanism, as such, is the *only* reality; but that is something which never has been and never can be demonstrated; something which cannot be explained will always remain, if only motion itself, if only sensation, as an element of consciousness. United to all the various other considerations, the idea of that irreducible something which constitutes our consciousness, in *restraining* our sensible consciousness, imposes upon us with like rationality the *restriction* of our sensible motives, and does so in the interest of others, in the interest of all. "Solipsism," as the English call it, is as inadmissible in ethics as in metaphysics, although it may perhaps be irrefutable in both spheres.

§ 148. *The Metaphysical Foundation Not Exclusive.* It may seem strange to base right on a principle of doubt, or, as it were, on a *problem*. But we shall see at once that this metaphysical basis does not in any way exclude all other positive and scientific foundations; it merely prevents their being set up as *absolute*, and it thereby prevents justice and the right from being *wholly* absorbed in force or in interest, in short, in mechanism and in organism, which are not perhaps the whole of nature. Now this "non plus ultra" is essential for the establishment of a right which is genuine and yet immanent, which egoism cannot break down, which force and interest by themselves are incapable of establishing. Moreover, this problem deals with an undeniable reality, namely, our consciousness itself, which, enveloping everything, cannot be enveloped or contained in any other thing; which is, in a word, uncontainable. Finally, we can maintain in a problematic state, but still irreducible to anything, that universal ideal of consciousness from which Kant derived his "category of the ideal." But Kant has sometimes seemed to represent as *transcendent* that which is in fact preëmi-

nently *immanent* and *constitutive* of consciousness itself; moreover, Kant tried to deduce from it an *imperative* and *formal* law. We no longer follow him in that part of the "Critique of Practical Reason," and we reject its transcendental, supranatural features; but we preserve what we can of the "Critique of Pure Reason," that is, one simple idea, the loftiest of all, the most obscure, the most enigmatical, that of the impenetrable depth of consciousness, which all of our analytical science is incapable of reaching. It may be said that this is simply an x, an interrogation-point; agreed, but this interrogation-point which involves me and you and all besides, suffices to demolish the dogmatism of force and of interest; it forbids them, since they are not the whole, to set themselves up practically as if they were. And on this basis may be founded the true *liberalism*, which had been compromised by the idea of force or of interest, considered exclusively.

§ 149. *Further Consideration of Human Consciousness.* So then, there is in the depths of man's nature a problem and an immanent enigma, whether with Hamilton and Spencer we call it the unknowable, with Schelling and Plato τὸ ὄντως ὄν, with Kant the "noumenon" or with Schopenhauer the will. There is a limitless perspective in human consciousness itself, an inexplicable outlook over other consciousnesses and thereby over the infinite universe, over universal society. This is what gives to the notion of right its more than physical character. Physical science has not, so to speak, turned the light of day into the human body and taken its machinery apart piece by piece; hence it cannot logically regard man as absolutely transparent and intimately understood. Why have we no fear of breaking an automaton? Because we are familiar with all its springs, and we *know* that it contains nothing more. But it is

not so with human consciousness. Suppose that, having before us the inanimate body of a man, we cannot possibly say with certainty whether he is dead or only unconscious; do we dare to place him at once in the grave? Of a conscious person, we may not know of our *certain* knowledge whether there is a complete absence, or only a lethargy, of that freedom which we believe to be at once the most essential individual power, and the power to will universally. Furthermore, even if positive science had made out the complete anatomy of the thinking, willing, loving being, we should still have to learn what *being* is, what *thought* or *consciousness* is; and again the question would arise: Is this at bottom fatality and mechanism, or is it life and liberty? "The deep sorrow which we feel at the death of one whom we have loved," says Schopenhauer, "springs from a feeling that there is in every individual something *inexpressible*, which belongs to him alone, something *irreparable*: 'Omne individuum ineffabile.'" Schopenhauer might have added: This natural mystery which man bears in his breast is the metaphysical foundation of right. Scientifically, a right is an *ideal* value conferred upon human consciousness as incomparable with crude mechanism; metaphysically, it is perhaps a *real* value. This simple *perhaps*, this single possibility, this place reserved for reasonable doubt, and therefore for reasonable induction, this, to say nothing of all positive and scientific reasons, would suffice to restrain us when we are disposed to trespass upon the consciousness of another. Thus, in spite of ourselves, we stop short before our fellow man as before an indefinable something which our science cannot fathom, which our analysis cannot measure, and which, by the very fact of its being a consciousness, is sacred to our own consciousness. Is this one of those superstitions which, according to Goethe,

are the poetry of life; or is it an intuition, on the contrary, of some fundamental truth? In the presence of a conscious being, we experience what the ancients called a religious dread, a religious quaking, a "horror":

"Quæ potuit fecisse timet."

§ 150. *Relation between Rights and Self-Respect.* This metaphysical, but entirely natural feeling, of which religions are only the crude, anti-scientific expression in terms of the supernatural, we experience towards our own selves; we stop short, as it were, before ourselves, because we perceive in our own consciousness a kind of abyss before which positive science reels. This is the feeling which we call *respect* and which forms an integral part of our sense of the *right.* From the æsthetic point of view also, the right is one of those things which awaken in us the impression of the sublime, with its two alternating emotions — a melancholy concentration, and a joyous expansion and pride. The infinity which dwells in man, at least in idea, crushes us at first, and then exalts us; since it is within our consciousness, it is in some way within *us*, it is *ourselves;* the universe is ourselves and we are the universe. The sense of the right is a kind of disinterested pride; the sense of the right of others is a kind of disinterested fear, which is resolved into a final sense of peace and acquiescence, the primary foundation of fraternity and universal society.

Metaphysical *modesty* is thus the principle of moral *dignity:* Socrates was right in believing that we are as great through the idea of what we do not know as through what we know. To conceive a limit is also to conceive a something beyond, to imagine if not to know it.

§ 151. *Science Ends Where Justice and Right Begin— in Doubt.* Perhaps, indeed, we can frame a remote, indirect, symbolical conception of this very depth as a

reality, in some such fashion as the astronomic heaven is a symbol of the real, the unknown heaven. Appearance, after all, must be related to reality as the apparent movements of the stars are related to their real movements. There is relative truth even in the system of Ptolemy, although it may be farther from the truth than the equally relative system of Copernicus. Metaphysics is in our opinion a hypothetical speculation, an ideal prolongation of the lines which personal consciousness and science itself have previously traced, a search for their convergent direction and for the focus in which they will coincide. This focus would be the very foundation of nature — preëminently the natural, and not at all the supernatural, which is only its shadow projected on the clouds. The indestructibility of the metaphysical instinct proves that there is something essential to our mental organization: *man is a metaphysical animal.* If this is an illusion, we ought to be able to show that it is a cerebral illusion merely, and to reveal its source. No such proof has been produced. It has never been demonstrated that beyond, or rather within, what we feel and know, or can feel and know, there is nothing in an absolute sense. At all events we have the idea of this *inmost something* — an indestructible and fascinating idea which draws us on in quest of new and more or less transitory symbols by which to express the eternal mystery of the universe and of consciousness. Science ends in doubt, and this very doubt is the beginning of the metaphysical hypothesis of the universe—an hypothesis which is, in fact, only an induction founded on knowledge itself and on the data of consciousness, to the complete exclusion of ontology. Doubt is thus the beginning of morals and of right properly so-called. The limitation of knowledge, as we have seen, is expressed in conduct by the limitation of an intelligent and conscious

activity in the presence of other intelligent and conscious activities; whence we have right and justice. Beyond those confines there begins, with metaphysical and cosmological speculation, that kind of moral speculation which, according to one's practical system, is either egoism or charity. Egoism is the symbolical affirmation of the radical division or opposition of beings or consciousnesses, a moral atomism, in short; fraternity is the symbolical affirmation of a radical union. These two are working hypotheses concerning what we do not *know*, concerning the fundamental principle of the universe and of the individual. But justice, which can only practically affirm our ignorance of the essence of things and of consciousness, is infinitely less hypothetical; it has, so to speak, the sincerity of a thought in harmony with itself, in practice as well as in theory.[3]

[3] *Espinas*, an extreme partisan of naturalism, has said: "For the naturalists, rights are consequent upon social action; they are a matter of opinion. We think that there is nothing in the *personal* constitution of man at his birth upon which the right to life, to subsistence, to possessions, etc., can be based. We will go so far as to say that if there is nothing *transcendental* in the depth of human consciousness, an infant could have no rights but for *men*, for *civilized* men; his title to moral personality depends on the measure in which rights are *recognized* in the social environment where he makes his appearance. If a female child is born into certain savage tribes, her rights consist in performing all the hard tasks, in eating roots, and in being beaten; if a male child is born into a royal family, he has the power of life and death over the other members of the tribe. Society does not limit itself to *defining* and *safeguarding* rights; it constitutes them, since rights are nothing more than the value *attributed* to a human being in a given country." (See the remarkable studies in RP which *Espinas* has devoted to a criticism of our "Science Sociale Contemporaine," October-November, 1882, p. 514.)

In the passage just cited, which expresses excellently the point of view of pure naturalism, *Espinas* does not distinguish between rights "de facto," granted by a society to its members, and rights properly so-called, or *moral* rights; he reduces the second to the measure of the first. According to his view, we ought to "go as far"; but we do not think so, for we leave open the question of the irreducible basis of consciousness. If we call *transcendent* whatever exceeds our empirical and phenomenal knowledge, then something *may* exist in human consciousness which is transcendent in this sense. Sensations of sight are transcendent for the ear, transcendent also for the blind; sensations of sound are

§ 152. *Objective Value of the Ideas of Freedom and Right.* When we raise the question whether the idea of freedom and of right has an objective value and corresponds absolutely to reality, the problematical character of the *speculative* solution does not forbid a *practical* one. The knot which thought cannot untie may be cut by action, for action cannot always and in all cases remain, like thought, in suspense. Thus everyone solves practically, in his own way, the fundamental and metaphysical problem stated above, and solves it affirmatively or negatively according to the degree of force which the ideas of freedom and right have acquired for him. One in whom these ideas are intense and dominating embodies this belief to some degree in all his actions, which are shaped upon this interior mold. One, however, whose conceptions of ideal independence and right are only feeble and vague, doubts or denies their worth, and his conduct becomes like a doubt itself in action — a visible denial of every universal ideal; and he falls at the same time completely under the control of ideas of particular interest and material force,— so true it is

similarly transcendent for the deaf. The transcendent of the metaphysicians is, as it were, no more than the *transintellectual.* In this sense, the transcendent would be no less immanent in us, since it constitutes ourselves. Furthermore, the idea itself of the transcendent, if it has a meaning, is immanent; it is active within us only as immanent; by this idea we need only understand that which constitutes ourselves and constitutes other beings also. But in truth everything is immanent. We repeat, then, that the *limitation* and the relativity of our physical knowledge leave room for at least the *possibility* of a principle superior to that knowledge, although within the depths of consciousness; and it is upon this limitation that there is founded, rationally and as a last resort, an *abstention* from unjust actions, the *irrationality* of which cannot be fully demonstrated by *positive* science. There is *within* consciousness something with whose nature we are unacquainted, namely, consciousness itself and individuality; moreover, there is in the consciousness an *idea* of the universal; and this suffices to give us practical motives for refraining from actions which are contrary to justice, that is, to an equality of liberties — actions which would amount to a practical and dogmatic affirmation of egoism and *solipsism* as *final* truth.

that every idea tends to produce an outer effect and thus to express, to incarnate, to embody itself. From whatever point of view it is regarded, therefore, scientifically or metaphysically, the idea of the right does not remain inefficient and inert. It has more than the *physical* and *mechanical* value attributed hypothetically to man; it has an *intellectual* and *metaphysical* value, derived from a being capable of *thought*, able to think of himself, of others, of the universe; able by this means to transcend *himself*, to conceive of other conscious beings and to love them. In this sense, we may say with Pascal that all our *dignity* is in our thought. This idea that consciousness has a value which cannot be mathematically and mechanically computed, a value perhaps greater than any given material quantity, in inseparable from a spontaneous feeling of desire or attraction. By that intellectual attraction in which we recognize the intellectual form of the highest "altruism" the idea within us subjects and subordinates to itself all our other tendencies in proportion to its intensity and power — as a strong wind collects and drives along what before was flying about in diverse and opposite directions. Men are classed, in the metaphysical, moral, and social hierarchy, according to the effective predominance in them of the idea of a universal society of conscious beings and the idea of universal justice, according to the conformity existing between their actual being and this ideal of being. And what is true of individuals is true of nations also: they do not live by measurable realities alone, they live by the ideal. This ideal is not an abstraction; rather, it symbolizes the fundamental reality, or whatever it is which unites all conscious beings in one universe. In short, the right springs into being when the conscious individual, by conceiving *others*, becomes capable of conceiving the *whole*. The individual begins by saying

"I," then "thou" and "they," and ends by saying "all"; and thus is established that universal relation of individualities which constitutes the law.

CHAPTER VI

THE AGREEMENT OF THE THEORY OF IDEAL RIGHT WITH THE FORCE AND INTEREST THEORIES

DETERMINING WHEREIN THEORIES AGREE — FORCE MUST ACCOMPANY RIGHT — BUT RIGHT MUST NOT BE IDENTIFIED WITH FORCE — SUPERIORITY OF INTERNAL TO EXTERNAL FORCE — RECONCILIATION OF FREEDOM AND HIGHER INTEREST — THE POWER OF A LOVE FOR THE IDEAL — THE CULT OF FREEDOM — HARMONY BETWEEN IDEAL RIGHT AND EVOLUTION — A SCIENTIFIC SYNTHESIS OF IDEAS.

§ 153. *Determining Wherein Theories Agree.* In every philosophical or social question, it is important to determine precisely the points wherein the various doctrines agree, as well as those at which divergency and opposition arise. Is not a determination of the parts common to the most conflicting theories the best means of indicating the acquisitions of knowledge and of supplying its deficiencies? Let us therefore look for common points in the naturalistic and the idealistic doctrines. We shall see that the theory of ideal rights and of *force-ideas* leaves a fair share to the other theories, completes rather than destroys them, and reconciles them finally on a higher plane.

§ 154. *Force Must Accompany Right.* The true side of those doctrines which are especially concerned with power and with mechanism is that the law should not be left in the purely spiritual order, as a power not of

this world and with no physical force at its disposal. Every right should be capable of realizing itself externally by means of a true social and political mechanism — a kind of body of which it is the soul. To find this external protection for rights is the essential problem of "social mechanics." Its positive and practical study has been too much neglected by the French. After proclaiming the moral rights of man, French theorists have too often overlooked the fact that the realization of these rights in a system of harmonious forces, far from being achievable by authority in a day, is the work of the slowest and most difficult of the sciences. They have also forgotten that moral rights should not voluntarily disarm themselves by renouncing material force. In general, we hold force too cheap. Have we not seen individuals here in France who look continually to the constant care of the State for the material maintenance of their rights, and who have repeatedly renounced their external freedom for the benefit of a single man? What have we had in exchange? A simple declaration of inalienable rights, inscribed in the preambles of various constitutions; a declaration of Platonic love, deprived of all virtue by the remainder of the constitution; a contradictory system beginning with: I desire your freedom, and ending in: You are my prisoner. Pascal stated in forcible terms the real problem of rights when he said: "Justice without force is impotent, force without justice is tyrannical. Therefore justice and force must be united, and to that end, whatever is just must be strong and whatever is strong must be just." The French school of moralists, economists, and politicians in our day has dwelt too much on pure rights, without a sufficient effort after a means of changing abstract idea into material force. Upon this point we are idealists, excessive and chimerical; and the doctrine of rights most popular in France is, in its basic principles,

a pure idealism, too abstract and too vague. Also one of the true things in the socialistic theories, however Utopian they may be, is their insistence not only upon the recognition of rights, but also upon effective power to exercise them. He who speaks of rights speaks of freedom, consequently of power, consequently of force. [1]

§ 155. *But Right Must Not be Identified with Force.* But if it be true that force should accompany right to guarantee it and to give it effective power, right is nevertheless a different thing from the guaranty of right. We must neither materialize right, nor idealize it to excess. We have seen one of the most striking examples of the former tendency in Jhering's theory of "Der Kampf um's Recht." [2] According to this author, as will be remembered, not only should right meet force with force in case of necessity, but force and conflict are of its very essence. "Conflict is no stranger to the right. The conception of right is not a logical conception; *it is a pure conception of force*. . . . The end of the right is peace, and its means to peace is conflict, is war, is force." We see with what metaphysical subtlety Jhering makes the use of force an integral "element" of the right, of which it is only the last resort and makeshift. From the fact that one

[1] One may take in a good sense what *Louis Blanc* wrote in 1839: "The idea of right, abstractly considered, is the mirage which since 1789 has held the people under an illusion. These abstract rights are the lifeless metaphysical defense which has taken the place of the living defense which was the people's due. Rights, pompously and bootlessly proclaimed in charters, served only to mask whatever was unjust in the inauguration of a system of individualism, and whatever was barbarous in the abandonment of the people. So let us say, once for all, freedom consists not only in the rights accorded, but in the *power* given to man to exercise and develop his faculties, under the rule of justice and the safeguard of formal law." Guizot himself has said: "*Liberties* are nothing if they are not also rights, and rights themselves are nothing if they are not also *guaranties*." Only the socialists confuse the *power* to realize *by one's own effort* what one believes to be the best, and the *effective realization* entrusted to the State. What should be secured to the individual is the *power*, and not the *realization* itself.

[2] Translated into French by Meydieu, Paris 1875.

negative may cancel another, he infers that negation is a part of every affirmation; from the fact that "litigation, which is only a new form of combat," can reestablish an injured right, he concludes that the lawsuit is a part of right itself; thus we have a system constructed from lawsuits and quarrels, and war raised to the level of a theory. The right, instead of confining itself to repelling the attack, becomes itself the aggressor, the attacking party. Is this not to confuse the "essence" of right with its own limitation and imperfection? Suppose that all men do respect each other's freedom and conscience, will rights cease to reign because there is an end of strife and force? History shows us, on the contrary, that the existence of the right is the end of strife. Slavery, a violation of right, has brought long wars in its train; but since respect for the human being has led to its abolition, right rules in peace, and force has no further reason for existence. It has been the same with religious wars; it was not right and tolerance, but injustice and intolerance, which lit the fires of the Inquisition.[3]

§ 156. *Superiority of Internal to External Force.* The future of endless conflict, of litigation and war, which such a theory opens up, is not the real future. Thanks to the progress of our civilization, force tends from without to within, seeking an inward concentration, and a transformation within the individual into the higher form of intelligence. Do not ideas move mankind better than any external means? The greatest *force* without, the greatest knowledge within, such is the

[3] *Jhering's* theory is only an unfortunate exaggeration of one of *Kant's* points of view, which made the idea of constraint an element in that of right. But the power of constraint which should accompany a right is not the right itself. Furthermore, the *power* to constrain is not necessarily effective constraint or force in operation; it is only available force, ready to act in case of necessity. Power is one thing, its use is another. Use should diminish at the same rate at which power increases. In the language of mechanics, the power gains all that is lost by the resistance made to it, or which it is compelled to make, since this resistance is wasted energy.

highest degree of *power* in a society. The most perfect society is that in which there is the least external, violent interaction of its citizens one upon another, and the highest degree of internal, individual activity. The ideal would be an absorption of all coercive energy in spontaneous force, of all external resistance in the innermost impulses of consciousness. Intellectual power, conscious thought, would thus replace physical power; and for right to become a reality, it would be enough that it should be an idea.

If this be true, should not the naturalistic school finally agree with the idealistic, and may we not interpret their doctrine in a higher sense which reconciles it with our own? Freedom may be regarded as living force in its very essence. [4] Now what is the most indispensable thing in mechanics? It is force; wherever force is stored up, as heat lies latent in a combustible, there is value proportionate to the intensity of that force itself. Now in our world the principal force is man, and man is capable of thought and volition. Thought is an inner force, superior, even mechanically, to all external forces, which it assimilates and turns to its own ends. There is no machine comparable to the human brain, for it is the source of all other mechanisms, and it holds within itself a promise of the transformation of the globe through knowledge. Thought, in its turn, is only the will in action, taking cognizance both of its own power and of external resistances, and calculating the relation of each to each. It is peculiarly important, then, for the development of power and knowledge, that there

[4] He who speaks of force speaks of an activity capable of manifesting itself externally in visible motion, internally in that invisible impulse which is thought. Now activity is represented psychologically only by will and desire, wherein we seize our own power in action. If to live is to act, to act is to will. Freedom thus understood is the basis of being and of life itself; it is life regarded as tending to perpetuate itself and to extend itself indefinitely; it is being, considered in its aspiration towards the infinite; in other words it is conscious force, active and progressive.

should be forces, conscious wills, as vigorous, as ardent, as eager for progress as possible; and the sole means to that end is to free the conscious will of its fetters, whether material or moral, to abandon it to its spontaneous impulses, to its essentially energetic and progressive nature, and consequently to its natural freedom. In this sense one may say: "Yes, right is power, but the supreme power is freedom."

§ 157. *Reconciliation of Freedom and Higher Interest.* Freedom and higher interest may be likewise reconciled. The interest of a being is to be, as much as possible, to be indefinitely and without limitation, and by that very fact to act and to enjoy in ever increasing measure. But the maximum of freedom involves the maximum of conscious action and of enjoyment; thus a utilitarian society should be as watchful not to let the hearth of freedom and consciousness grow cold as the ancients were to keep alive by night and by day the fire which was to furnish them light and heat. This fact was recognized by the Benthams, the Mills, the Grotes, and the Spencers.

§ 158. *The Power of a Love for the Ideal.* A love for the ideal, seemingly so far removed from the useful, but without which there is no true freedom of the mind, is itself among the most useful resources of the intelligence and the will; in ideas, in science, and in art, nothing is more necessary than the superfluous. An exclusive attentiveness to practical results is *Americanism*, which has had its hour among the youthful peoples of a new continent, chiefly occupied in earning a livelihood, but which would be dangerous for England and for Germany as well as for France.[5]

[5] Germany itself, indeed, has experienced attacks of this malady. This is what was recently deplored, as we have seen, by *Bois-Reymond*, who made an eloquent plea for the rights of the ideal. "It must be confessed," he said, "that even among ourselves *Americanism* has made alarming progress." (Loc. cit.)

§ 159. *The Cult of Freedom.* Zeal for the ideal is not fundamentally different from zeal for freedom, for it is by disinterested devotion to ideas that the mind is set free. The sordid pursuit of material power or interest is self-enslavement. The idea alone, said Plato, makes the wings of thought to grow. Thus, even if we must assign a rank to freedom and consciousness in the hierarchy of forces and interests, as in that of intellectual and moral goods, freedom is essentially ambitious and cannot content itself with an inferior place; it is in the foremost rank or in none at all. True practical liberty is indeed that which inevitably tends to transcend all limits, to rise above every subordinate rank, every inferior condition. Liberty is the immortal ambition of a being who, conceiving the universe, feels himself made for progress.

§ 160. *Harmony between Ideal Right and Evolution.* The doctrine of ideal right, as we have set it forth, is equally reconcilable with that of evolution, whether this is regarded from Hegel's dialectical point of view or from the biological point of view of Spencer and Darwin. But logical and dialectic determinism must receive into its bosom the *idea* and the influence of freedom, such as we have shown it to be. Moreover, it must be recognized that this idea outstrips and excels the facts, judges them instead of accepting their judgments, rules them instead of merely summing them up, even produces them in part instead of being their abstract result. In our view, it is not for the idea to worship the fact, but for the fact to worship and serve the idea. As for the biological point of view, we accept everything positive which can be said concerning the social organism and its laws; we believe that the evolution of the social life, by the play of forces and interests, and, we must add, of ideas, realizes an indefinite approximation to the right.

In a word, we reject nothing in the naturalistic or idealistic doctrine, at any rate nothing *positive;* but above the laws of force, of interest, of life, of thought, we set up the *problematic* notion of an activity which contains the very principle of motion, of life, of thought, and which is thus the root of consciousness. Even though we do not, like Spencer, leave the idea of the *unknowable*, or rather of fundamental consciousness, inert and impotent, outside all moral or juridical influence; neither do we, on the other hand, like the author of "The Practical Reason," make of this idea, by a kind of moral or juridical absolutism, a mysterious *imperative*, an entirely formal and despotic law. We strive rather to maintain between speculation and action the harmony compromised by Kant. To this end we *limit* empirical thought and empirical conduct by the same boundary, by the same idea, namely, that of *consciousness* incomprehensible to objective *knowledge*; and by extending this same necessary limit[6] to all conscious and active beings we constitute the right. As to the rest of the moral ideas, let us understand them for what they are, which means holding a speculative or a practical hypothesis concerning the unknowable content of consciousness and of existence. And there are two possible hypotheses: first, the content of being and of consciousness is *love of self* — from this springs exclusive utilitarianism; second, the content of being and of consciousness is the *love of all* — hence the doctrine of charity. But we impose upon utilitarianism and upon charity the same speculative and practical limitation: first, restriction of empirical affirmation for some, and of metaphysical affirmation for others; second, restriction of activity for all, in short, *justice* in thought and in act, λόγῳ καὶ ἔργῳ. Intolerance and absolutism, whether in the form of egoism or of charity, thus give place to the liberalism

[6] See the preceding chapter.

of rights, founded on a common limitation of liberties and consciousnesses, which is the necessary condition of their union in society.

§ 161. *A Scientific Synthesis of Ideas.* By this building up of all these doctrines in successive courses, into a single edifice, we establish not an arbitrary eclecticism, but a scientific and metaphysical *synthesis*, in which each point of view has its definite and demonstrated place. The laws of force derive their support from the laws of interest, those of interest from the laws of life and of the social organism, those of life from the laws of thought and of scientific determinism, those of thought and determinism from an ideal of freedom and universal will, whose reality is still a problem for us, but which, nevertheless, in *limiting* our egoism by equal justice to all, makes the final diffusion of goodness possible. In the universal equation, the naturalists completely ignore the inevitable and insoluble x, that x which is involved in the very fact of consciousness. We show that this x has a determinable restrictive influence upon thought and action, and that its positive value can be hypothetically inferred by a prolongation of the entire series of phenomena in the observed direction. We believe that we thus reconcile Kantianism properly understood and evolutionism properly understood, and these are to-day the only positions which it is possible for thought to take. These positions are not in our opinion mutually exclusive, but on the contrary they are mutually complementary. Evolutionism is the base of the pyramid, the idea of a mechanically inexplicable *consciousness* is its summit — an idea accepted, indeed, by Spencer himself, but left inert by him and confused with the consciousness of the absolute. The far view from this high summit exerts a *directive* influence, in helping us to get a glimpse at least of the central point at which all the visible lines finally converge.

CHAPTER VII*

THE DIRECTIVE IDEAS AND THEIR STRUGGLE FOR EXISTENCE — THE FUTURE OF THE IDEA OF RIGHT

ERRORS OF THE FRENCH DEMOCRATIC PHILOSOPHY — PRESENT NEED OF DISCRIMINATION — HARMONIZATION OF POWER, INTEREST AND RIGHT — THE METAPHYSICAL TRANSITION FROM THE EGO TO THE NON-EGO — THIS TRANSITION IS THE FOUNDATION OF JUSTICE — SUMMARY OF THE THEORY OF IDEAL RIGHT — THE IDEAL HAS A POTENTIAL REALITY — FREEDOM THE BASIS OF FRENCH SOCIAL PHILOSOPHY — THE EVOLUTION OF IDEAS — PRESENT TENDENCIES REVEAL THE FUTURE — HUMAN EVOLUTION WORKS TOWARD A DEFINITE END — HISTORICAL EXPRESSION OF THE DOMINANT IDEA OF THE FRENCH — DEMOCRACY THE PRACTICAL END OF FRENCH THOUGHT — A PROGRAM FOR FRANCE.

§ 162. *Errors of the French Democratic Philosophy.* As we have seen, rights, especially as represented by the democratic philosophy in France, are from the scientific point of view only an ideal. The error of that philosophy, in viewing rights as immediate realities, is its failure to recognize clearly its own idealism. It constantly speaks of *natural* rights, when it should speak of *ideal* rights, for nature knows nothing of rights, which appear only in the thought of man. This first error

* [This chapter = the Conclusion of *Fouillée's* book. Four chapters which immediately precede, dealing with equality as viewed by the democratic and aristocratic schools, are here omitted.— ED.]

proceeds from a second: our traditional philosophy does not see that *moral freedom* is itself a pure idea, a force-idea, a *becoming*, not a present, completed reality. It has moreover confused liberty with free will, the common conception of which is anti-scientific, but which is resolved by psychology into a determinism partly unconscious, but flexible and perfectible. Finally, it has not always taken sufficient account of the superior rank of ideal freedom, which makes it an end for us, not a mere means; it has not rejected frankly enough the old doctrine by which liberty is subordinated to a *good in itself*—to virtue, to truth, or to some other absolute principle, the possession of which is presupposed. These defects of theory have brought practical defects in their train — a neglect of reality, of nature, of history, a tendency to project the future into the present or even into the past, and to confuse what will be with what has been — too exclusive fondness for declarations of principles and neglect of their applications, exaggerated disdain for interest and force, those necessary organs of the right, in short excesses of enthusiasm joined to lack of the positive spirit.

§ 163. *Present Need of Discrimination.* The time has come to distinguish more sharply that which ought to be from that which is, idea from material fact. If one is careful not to confuse the domain of the ideal with that of the real, one will run no risk of losing the feeling for reality itself, and on the other hand one will be better able to bind the latter, little by little, by a judicious use of middle terms, to that ideal the realization of which one would like to hasten forward.

§ 164. *Harmonization of Power, Interest, and Right.* In our own case we have accepted in their positive principles the three doctrines of power [puissance], interest, and right, and we have superposed them in their

hierarchical order, in a way to make a kind of construction the several courses of which support each other from base to apex. The most material foundations of the edifice have been furnished us by the theory of superior power, whether physical or intellectual; without force nothing is possible, and everything which has reality also has force. From this point of view rights are the maximum of individual power compatible with the maximum of social force. But the organization of forces cannot be understood without that of interests, and here the Utilitarian philosophy takes its stand; according to it, rights are the maximum of individual power compatible with the maximum of social interest. There are two forms of the Utilitarian philosophy itself; the one, too individualistic and atomistic, regards society as an aggregation of individuals each one seeking his own interest; the other, more biological and evolutionist, considers society as a living organism subject to the universal laws of evolution. The biological and evolutionist point of view appears to us much more lofty than that of Hobbes, or even of Bentham. Indeed, it is easy to reconcile forces and interests; for they are mutually complementary, or rather they are the same thing under different aspects, the one external, the other internal.[1] It is not so easy to reconcile the pure idea of right with the other two principles; it would even have seemed impossible to us, as it did to the historical, dialectical, and Positivist schools, if to these separate principles we had not assigned separate domains. As we have previously said, for us the domain of rights, properly so-called, is the ideal; the domain of forces and of interest is reality. It is by pure ideas, the highest that

[1] One is relative to what the metaphysicians call the "category of causality and mechanism," the other to that of "immanent finality and organism."

may possibly be conceived, those of individual freedom and universal society, that the structure is completed. Force and interest without right would be life without an ideal; rights without force or interest would be the ideal without life. But in fact, the *ideal* is itself a *force*, since it moves humanity, and may move to some extent the world itself; it is also an interest, since thought has constant need of it and it is the perpetual object of desire. It is for this very reason one of the *factors* of human evolution, one of the movers of the social organism, one of the most important springs of the conscious life. Thus the theory which we are proposing links the others together; on its positive side it is naturalism and idealism at the same time—it preserves both all the facts and all the ideas for what they are, but it seeks to bring facts and ideas together, little by little, until they reach that ideal limit of universal evolution, where the distance between them is reduced to nothing, where supreme force and supreme interest coincide with liberty.

§ 165. *The Metaphysical Transition from the Ego to the Non-Ego.* This limit is the object of that metaphysical, or if you please, cosmological and psychological speculation, which it is important to leave open. The fact that we have a consciousness of the ego and that we conceive of other consciousnesses but are unable to explain consciousness itself, *limits* intellectual dogmatism, and by that very fact, as we have seen, limits also moral and social dogmatism, of which injustice is one form. This limitation or restriction is therefore the principle of justice: "abstine et sustine."

The various theories of law, in order that their several conceptions of society may be made realizable by the individual, appeal each to a special motive; but each of these motives has seemed to us inadequate by itself. Force alone cannot realize the social conception toward

which it aspires, nor can interest, nor abstract right. Hence we have combined, so that each one supplements the others, all the motives and purposes which can act upon the will, which can, so to speak, give *practical* effect to the ideal of the right. "Be just," let us first say to the individual, "in view of your own power and in view of social power, which *in general* coöperate; be just in view of your own and the social interest, which *in general* agree; but if they should disagree still be just, for reasons of logic and science, for general, rational, and scientific motives, since logically, rationally, and scientifically the power and the interest of all are more desirable than the power and the interest of one alone. You are a rational animal, that is to say, logical and scientific; and hence you have within you an instinct for generalization through which you comprehend the identity of your own good and another's in the *general* good, and the scientific superiority of this general good over your own personal good. A = A, one man = another man, and the good of all men is more than the good of one. From this arise new motives which tend to lead you out of your egoism: first, sympathy for other *individuals*, which is *altruism* in its true sense; second, devotion to *society* as a whole, or social devotion, which Clifford calls *social piety*. Are these various incitements — at once emotional and intellectual, sensible and logical, no one incompatible with naturalistic, Positivist, or evolutionist doctrines — are these still insufficient to cause you to forget that self whose egoism it is so hard to refute by any theory based exclusively on observable *facts* and on laws scientifically demonstrable? Then there remains another point to which, being human, you cannot raise yourself, but to which science leads you, for it is the *prolongation of science* into another domain; it is the metaphysical or cosmological point

of view, which is one with the moral point of view properly so-called. You conceive the extreme boundary of positive science, the *relativity* of that mechanical and physical science which is a function of your brain, its impotence to seize, over and above the fact, that objective reality which your thought divines; more than that, the impotence of physical science to explain your *thought* itself, your mere sensation, your *consciousness*, your real or apparent ego. The science of nature is inadequate for the interpretation of thought or even of sensation. Beyond the known is the unknown, beyond the relations, are or may be the terms of the relations, beyond appearances is perhaps reality, x. At any rate, beyond all the relations grasped by consciousness there is consciousness itself, that is enough. Without speaking of "absolute reality," of the *problematical* absolute, of which we know neither whether it is nor what it is, there is a reality outside yourself which you are constantly affirming, and which forces you, in a sense, outside of yourself, to go beyond yourself; this is the reality of other *consciousnesses*, other *egos*, other thinking or feeling beings.

Thus do you pass not only from the *ego* to the *non-ego*, but also from the *ego* to other *egos*. Now this is a metaphysical transition before the explanation of which that system of philosophy breaks down which the English know as *solipsism*, that is, the idealism involved in the exclusive affirmation of the self, a kind of theoretical egoism. There is therefore, deep down in your thought, a metaphysical disinterestedness which permits you to conceive of other consciousnesses, even an unlimited number of them — and of merely possible sensations. In the depths of your general, spontaneous consciousness, you have at once, in a sense, both an individual and a social consciousness, a place, it would seem, where you are yourself, and where you enter into others. You

are an individual and you are society; you are, or you appear to be, personality and impersonality; you are yourself and the universe.

§ 166. *This Transition is the Foundation of Justice.* Such is the metaphysical problem before which physical science succumbs; it is a point of interrogation standing at the end of every formula of the mechanism of nature. Every metaphysical cause and motive which can act upon the moral being has its origin in this problem, and man, by the fact that he can state it, though he cannot solve it, has a *metaphysical* nature. In speculation your thought necessarily propounds this problem; in practice every question of justice and right implies its recognition, a recognition, both theoretical and practical, of the *limitation* of egoism. If you are unjust, you act as if your ego were all, as if the ego of others were completely separated from yours, outside your own, a foreign enemy. An injury to another is a practical *affirmation* of something which you really do not know and have no right to affirm: egoistic atomism, as the last word of the universe. Injustice is completely anti-scientific, anti-metaphysical, anti-social, and anti-moral. Hence rationally, scientifically, metaphysically, socially, and morally, egoism has a legitimate limit. Since this limit is the same for all, the consequence is an equal limitation of individual wills, practically expressed in the equal freedom of all. And from the metaphysical and moral point of view, this limitation is the ultimate foundation of rights. [2] Whether you take the one side or the other, you may be egoistic or disinterested as you choose, without violating justice and right properly so-called. Then you pass from abstention to action, from the point of view of a purely *critical* philosophy, which simply recognizes the limit of thought, to a *constructive* metaphysics

[2] See above, part ii, ch. v.

which announces or conjectures a solution upon the basis of things. This metaphysics takes, according to its system, either the part of *egoism* or that of *fraternity* as the radical and essential principle. But the domain of egoism, like that of devotion and fraternity, finds its limit in the rule of justice which must be recognized and accepted alike by all. Hence the breaking down of all absolutism and all dogmatism, whether in thought or in action. We must begin by putting in practice, "Bear and forbear," which is the law of *limitation*, before obeying the precept "Love and act," which is the law of *expansion*. The dogmatism of charity is as inconsistent with rights as the dogmatism of the egoist.[3]

§ 167. *Summary of the Theory of Ideal Right.* In brief, everything is bound together by the doctrine of *ideal right* as we understand it; everything is logically deduced, and can be summed up in more abstract terms, in the following formulæ, the development of which we have given above:

(1) Our point of departure in experience is *consciousness* itself, which conceives of itself, of other consciousnesses, and of the whole world, and consequently has, as a whole, an *individual* character and a *universal* bearing.

(2) Consciousness comprehends its own *relativity* as a means to knowledge, for it cannot adequately explain either its own nature as the thinking *subject*, or the nature of the object of its thought, or the transition from the subjective to the objective. On this is based the principle of the *relativity of knowledge.*

(3) This principle is rationally *restrictive* of theoretical egoism.

(4) Consciousness arrives, by projecting itself outward, at the problematical conception of a positive *ideal* of individual liberty and universal society; this

[3] See above, part ii, ch. v.

ideal, at once cosmological, social, and moral, is rationally *persuasive*.

(5) A new *fact* of experience then comes in: the tendency of the ideal, and, more generally speaking, of directive ideas, of *force-ideas*, to realize themselves.

(6) Pure right then appears as the rationally higher value belonging to the universal ideal of a free union of consciousnesses. As an ideal restrictive of egoistic absolutism, this conception is the basis of justice or law properly so-called; as a persuasive ideal, it is the foundation of fraternity.

(7) External liberty is deduced from the necessity of insuring to each his internal spontaneity, the self-driving evolution of his consciousness — an evolution with which the use of force or of absolutism would be inconsistent.

(8) The *limitation* of this external freedom, in the presence of others, is necessary as a consequence of the *limitation* and of the relativity of intelligences, which excludes individual absolutism.

(9) The *equality* of external liberties and their mutual limitation by law, whence comes equality of civil and political rights, is deduced in its turn from freedom itself; for all inequality is necessarily a diminution of freedom to the advantage of a few privileged persons. Moreover, equality is also a deduction from the limit imposed on all consciousnesses equally by the irreducible foundation of consciousness itself and of reality.

(10) *Progressive equalization* of economic and natural conditions in human society is a final consequence brought about by nature itself and by social progress.

(11) Our theory reconciles the idea of freedom with those of superior power and higher interest. The concrete and complete right, at once real and ideal, becomes *the maximum of freedom, equal for all, which is compatible*

with the maximum of freedom, force, and interest for the social organism.

Such are the principal links in a close series of deductions in which we believe there is no break of continuity. Harmony is thus established between naturalism and idealism, between the scientific view of evolution and the metaphysical view of the consciousness inexplicable to itself. Spencer failed to derive any moral consequences from this latter point of view; after leaving our knowledge of the explicable dependent on an inexplicable principle, for which he gives a formula that is all too transcendental, he makes no further use of this principle in his moral and juristic theory. This shows, I think, an astonishing inconsistency in his own system. While we do not pretend to find support for the philosophy of rights in what would thus by definition be unknowable and transcendental, it is necessary, as we have already shown, for the idea itself of the enigma immanent in consciousness to restrain and limit purely material purposes and motives. On the other hand, Kant has drawn from his transcendental *unknowable* a practical dogmatism, a kind of moral absolutism which seems to me to contradict the true results of his speculative critique. I think that I have restored to the *limitative* principle its true value by avoiding altogether the moral dogmatism of Kant and the kind of indifferentism of Spencer, which does not ask at all what moral consequences may be drawn from the fact that we are conscious beings.[4] The true limitative principle, I think, is *immanent*, and is reduced to consciousness itself, of which other consciousnesses and objective reality are a projection, and the transcendency of which is only a mirage. My theory is an *immanent monism*.

[4] See in the *Revue des Deux Mondes*, our study of "Les Postulats et les Symboles de la Morale Naturaliste," March, 1883.

§ 168. *The Ideal Has a Potential Reality.* Let me add in closing that the harmony thus established by theory cannot fail to be established also in practice nor to manifest itself in history. We may also anticipate a closer and closer agreement among the various nations in their conception of human and of universal rights. The oppositions of to-day are fleeting; they are due especially to the fact that the European nations, at one time impeded by hereditary privilege, at another time reduced to servitude by some Cæsar toying with fortune, have not been permitted hitherto to see established in their midst either complete freedom or real equality, without which there is no lasting peace or genuine brotherhood with other nations.

§ 169. *Freedom the Basis of French Social Philosophy.* Our social and political philosophy in France must frankly avow that from the scientific point of view it rests upon a pure idea, which, however, from the point of view of metaphysics and cosmology, may be a remote symbol of reality. Is this avowal a mark of weakness? On the contrary it is an indication of power. The *directive ideas* are motive forces of greater or less strength and certitude, but they are always necessary. They are for rational beings what instincts are for irrational. The bird holds in its brain the image of the nest which obsesses it like a dream, at the same time a memory of the past and a divination of the future. It labors under the sway of this interior vision, until it has given to it material shape and has built on the branch the real nest in which it is to hatch its young. And this instinct is commonly infallible. The visionary is a prophet. As animals act from instincts, so men act from ideas; and so do nations, with whom ideas always assume an instinctive form. The ancient Germans, engrossed by the

idea of battle, dreamed of a heaven where warriors would come to life healed of their wounds, fit to renew the fight. Other peoples were intoxicated with the idea of pleasure, and dreamed of a paradise of houris. With some, power has been the object of thought and instinct, either habitually or occasionally; others have been devoted to the useful, and others still have lived for the beautiful; some live to labor, others to contemplate and admire. Among all the directive notions of nations, epochs, and individuals, the struggle for existence has dominated, and dominates still. There is a natural selection of ideas as of species; every idea is, in my opinion, a specific form and type, an *ideal species*, as Plato would say. The idea of freedom, for example, symbolizes a species of beings who have within themselves the principle of their activity and of their unlimited development. We classify all men under this idea of independence, even those most manifestly in a state of moral slavery, just as we classify under the conception of the ideal circle all the actual curves which *tend* to be circular, however widely they may deviate from the controlling line. Man aspires to be free as a drop of water falling from the clouds aspires to be a sphere, as the rainbow in the sky aspires to be a circle. The ideal right of man, then, is to be free, as the ideal right of a ray of light is to extend in a straight line. This is at least the idea which certain men and certain nations at various times have formed of the essential direction of humanity: the French people, for example, appear to-day to be unable to conceive it otherwise. Possibly some other nation may succeed in conceiving some other directive idea; but as individuals and nations must act, and as rational beings cannot act without an idea, every individual and every nation must seek its strength in its own moral and social idea, whether lasting or transitory, destined to survive or doomed to perish with the ages.

§ 170. *The Evolution of Ideas.* Among the instincts of animals there are certain aberrations due to the perpetuation, by a kind of hereditary tradition, of acts which were formerly useful to the species but are now useless. More than one example may be found among the bees and the ants. Similarly, among the directive ideas of individuals and of nations, there are superannuated forms of life and conduct, types of action which have outlived their usefulness, such as certain religious conceptions once good but now useless or even injurious. Such are also certain moral conceptions which are now nothing but prejudices, certain social or political ideas which in our day are mere antiques, like those of the nobility, caste, absolute royalty, the divine right of kings. These are, so to speak, twilight ideas, and others, on the contrary, affect us like the morning dawn. We debate the question which will retire into the night and which will grow in brightness, but the coming of the day will end the dispute. History will show which were wrong and which are right. At the present moment we should like to know whether the future belongs to equal freedom and to human brotherhood, or whether every ideal of pure right is to be replaced by the play of mechanical forces, the play of interests, or that of biological functions. Among the adverse ideas which struggle for life in the bosom of humanity, it is for each individual, for each nation, to choose its part.

§ 171. *Present Tendencies Reveal the Future.* But science may forestall history, and may tell us, even before the sun has appeared, whether the lights on the horizon are those of the evening or of the morning. The value of an idea is tested by its theoretical development and by its practical application, as a motion is tested by computations in pure and by experiments in applied mechanics. The same is true of the idea of right; we appre-

ciate its value best when we have followed out both its speculative developments and its social applications. We hope to show, in the course of these studies, that society may be constructed conformably to this directive idea of right, which completes, without destroying them, the ideas of *power* and of *interest*. Already we have deduced from it the progressive equality of men; and we believe that we can also deduce from it progressive fraternity, the formula of justice, the law of contracts, the rule of modern legal systems, the particular character of the evolution in the *social organism* subject to the control of ideas.[5] Furthermore, history shows us all the consequences of this notion of right which tends toward realization under our eyes, and is being realized more and more every day. Are we not hence justified in concluding that society will end by really organizing its forces and its interests in accordance with the ideal of right, and that we have in this idea a forecast of the coming humanity?

If an astronomer discovers in the starry vault a nebula in process of condensation, and if he can, by the aid of the telescope, study the form, the direction, the rate of movement of the stars which compose it, these facts, if they are numerous enough, will perhaps enable him to determine in advance the form which this sidereal matter will one day take on, and the single center around which, after thousands of years, these suns, in motion for ages, will eventually unite. History and the psychology of peoples do an analogous work, in which the past and the present disclose the future; they display to us in the laws of motion and of life, and consequently in the laws of force and of desire, a determinism which must always be taken into account; but they show us also, in the aspiration towards universal liberty, the

[5] See, on these points, our "Science Sociale Contemporaine."

principle and the end of all the activities and desires of human kind. The idea of liberty, of independence, and of right is henceforth for us the highest ideal which we can conceive; and, in the end, from the standpoint of progress, the advantage necessarily rests with the highest ideas. In the ancient symbolism, the visible universe was born complete from that eternal aspiration, or, if one prefers, from that everlasting word, reverberating through immensity, "Let there be light!" May we not say that the moral and social universe was born complete from a perennial desire or hope, from an indestructible idea, from an internal word which has resounded to infinity in the consciousness of mankind, and has expressed itself in the acts of history — Let there be liberty!

§ 172. *Human Evolution Works toward a Definite End.* We must apply to these high conceptions, such as liberty and right, the words which Schelling and Hegel use with respect to God: if they *are* not, they *are becoming.* From the scientific point of view the evolution of nature, its *becoming*, may, properly speaking, have no preconceived end; but the evolution of humanity has, for humanity proposes an end to itself, and sets up an ideal for its realization. The greatest men and peoples are those who have ranked this end the highest and have struggled for its attainment.

§ 173. *Historical Expression of the Dominant Idea of the French.* Thus is revealed to us the law of development from whose dominion no country may withdraw itself without degeneration, without bringing its greatness, its very existence, into deadly peril. A people develops according to the directive idea of which its national character and philosophy are the expression in the great periods of its history; now the principal directive idea of French democracy, as we have seen,

has been that of liberty producing equality and fraternity. May we not draw from this fact highly practical conclusions affecting the future of our democracy? We will limit ourselves here to a bare preliminary indication of them.

§174. *Democracy the Practical End of French Thought.* On the one hand, every nation needs, to enable it to resist the causes of dissolution, a moral cohesion, a psychical unity, that which is called the soul of a people. A people which would have a hundred diverse souls, so to speak, would carry division in its bosom, and sooner or later would break into pieces like those lower organisms whose life, still diffuse and scattered, tends towards dissolution. The laws of natural history are valid for nations, for although a nation is a product of voluntary consent it is also a natural organism.[6] On the other hand, any unity imposed on a people from without, as by a despotic central power, can only delay dissolution without preventing it. In the history of living species, nature works from within; and it is the same for humanity. Every people must have an inner unity which radiates from the center to the surface, determining its own form, as does life. Now this natural unity, for democratic France of to-day, is the idea of right. If we would recover our national powers, it is in this idea, better understood and scientifically applied, that we must seek our point of support, our common center of inspiration. From our civil and penal codes we must eliminate, gradually and methodically, those laws, not very numerous, in which the influence of old customs, ancient privileges, and state religion, still exists, at the expense of rational right. As to our political constitution the sole complete and adequate realization of the idea of right is the government of all by all; other systems

[6] See our "Science Sociale Contemporaine."

are in fact institutions of privilege, this alone embodies the common right. A factitious monarchy or aristocracy will always offend the logical spirit of the French people, which is an enemy to all figments, constitutional or other, and is little accustomed to bow to symbols or idols. Ideas of hereditary power, of irremovability, of royal or lordly prerogative, of traditional right or divine right, are repugnant to our sentiments of liberty and of individual responsibility, as to those of equality before the law. Furthermore, France is the only country in which the active, laboring classes concern themselves with the moral legitimacy of a government, in which they demand institutions conformable to reason and to right, and not mere expedients or compromises of interests and forces. This concern is the inevitable result of all the national tendencies which we have pointed out. To whatever extreme this love of logic and this devotion to pure right may lead, we must take it into account, and, what is more, must take advantage of it. We have no longer either monarchical or aristocratic traditions. For a century the true national tradition has been a trend toward democracy, as our genuine directive idea has been that of right. The tradition and the idea, still separate in the minds of most peoples, are united in the genius of the real France, all of whose tendencies and psychical aptitudes may be summed up by saying that it is liberal in aspiration, egalitarian, and democratic. Thus upon the ruins of other forms of government a law of irresistible evolution has caused to rise the only form which can be theoretically harmonious with the new spirit and capable of serving as its organ. Three times we have seen our country make trial of this form, an abiding object of the hopes and demands of the people. Almost every one in France agreed in the beginning that this kind of government would be the most

just in itself and the most nearly perfect, *if it were possible;* to-day the wisest have suppressed the limitation, and are saying, "It has become *the only one possible* in France."

§ 175. *A Program for France.* May we not, therefore, believe that the liberal and peaceful development of the new order, which sooner or later will become that of all the people of the earth, is alone capable, if properly understood and well controlled, of reviving our country and bringing it back into its true path? Many times the French nation has been seen to rise erect when it had seemed prostrated for good and all; to muster unexpected riches when its enemies hoped that it was ruined forever; to display a more determined will to live when it appeared ready to perish, a new and more fertile invention when its powers of thought seemed isolated and sterile. This is because, living habitually in a region not wholly national and egoistic, it does not feel itself attainted by its disasters in the better part of its being, through which it strives to identify itself with the soul of other peoples. It knows that it will not perish in so far as it lives in the life common to all. These ideas, not merely national but broadly human, are the only ones which can sustain a people through the ages. France can attain strength and salvation only from thoughts fed by the very thought of humanity — thoughts ever true, ever young, immortal as humanity itself; thus our ancestors, from the trunk of the ancient oak, alternately covered and despoiled of its covering by the changing seasons, gathered the evergreen mistletoe, fed by an inexhaustible sap, symbol and pledge at once of eternity. France, faithful to its genius, has reacted to material checks by the proclamation of a new and higher idea to which its conquerors will one day themselves be forced to turn for support; to the triumph of a conquering monarchy which had robbed it of its

fortresses, it has opposed the republican idea, which, as acknowledged by the German philosophers themselves, the Schopenhauers, the Strausses, the Hartmanns, as well as by the English philosophers, such as John Stuart Mill and Spencer, will one day be applied and realized throughout all Europe and over all the earth. Let France develop this idea in a more scientific sense, without disregarding, as she is too prone to do, the legitimate part which force and interest play in the social organism! Let her appropriate to herself the qualities of other peoples; let her set them an example of the most elevated, the most unselfish views, those consequently the most universal and the most pacific! Then, though materially diminished, France will be morally enlarged; cast down in the present, she will make her own future; in the face of governments of privilege, destined sooner or later to fall, she will have inaugurated by her initiative the only government worthy of the name and certain to spread over all the world—a government destined to subordinate power and interest, without disregarding their real laws, to the ideal of right and of fraternity.

(B) THEORY OF OBJECTIVE LAW ANTERIOR TO THE STATE — LÉON DUGUIT

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(B) THEORY OF OBJECTIVE LAW ANTERIOR TO THE STATE — LÉON DUGUIT

CHAPTER VIII[1]

PREVAILING MISCONCEPTIONS OF THE STATE AND OF LAW

OBJECT OF THIS BOOK — THE ALLEGED PERSONALITY OF THE STATE: (1) SURVEY OF MODERN THEORIES; (2) THESE DOCTRINES OF STATE PERSONALITY ARE FICTIONS; (3) PERSONALITY NOT NECESSARY TO SUPPORT PUBLIC LAW — THE STATE LIMITED BY LAW: (1) LAW IS BASED ON THE COINCIDENCE OF SOCIAL AND INDIVIDUAL PURPOSES; (2) LAW EXISTS WITHOUT, IS ABOVE, AND LIMITS THE SOVEREIGN; (3) LAW NOT BASED ON THE NATURAL RIGHT OF THE INDIVIDUAL; (4) THE DECLARATION OF RIGHTS OF 1789 — THE GENERAL NOTION OF THE RULE OF LAW: (1) LAW IS OBLIGATORY BECAUSE IT IS A FACT; (2) THE RULE OF LAW NOT A RULE OF CAUSALITY, BUT LIKE NATURAL LAWS; (3) THE JURIDICAL ACT AND THE LEGAL SITUATION — DEFINITION OF THE STATE — IMPORTANCE OF KEEPING CLOSE TO REALITIES.

§ 176. *Object of this Book.* It may seem bold to publish a book on the State and Law, a problem which has been studied from every side for centuries by the greatest minds without being solved. Our excuse for

[1] [By *L. Duguit.* From his "L'État: Le Droit Objectif et la Loi Positive." Chapters viii–xi here=pp. 1–52, 80–137, and 613–618 of that book. For this author and work see the Editorial Preface.—ED.]

this work is that we desire to accomplish a negative result — to show that the State is not that collective person invested with sovereign power (an idea invented by publicists); that the law is not that construction erected by the jurists on the unstable foundation either of individual right or of the omnipotence of the State; that this combination of fictions and abstractions disappears at the touch of the wand of reality. In a word, our object is not to tell what the State is, nor what the law is, but rather what they are not, and we shall be satisfied if we can do our modest part in breaking the narrow and artificial molds into which legal thought has been run for ages.

§ 177. *The Alleged Personality of the State.* 1: SURVEY OF MODERN THEORIES. With a few rare exceptions, all modern theories of the State and public law rest on the conception of the State as a person, the personification of the community. With diverse variations Bluntschli's definition appears everywhere: "The State is a combination of men on a given territory, as rulers and subjects, composing an organized moral person, or more briefly: the State is the politically organized personality of a nation residing on a given territory." [2]

Some see in the State a will, the collective will of a moral person. This is the metaphysical theory of the State, which comes straight from Rousseau and which is expressed in its purity in the constitutions of the French Revolution. "Sovereignty is one, indivisible, inalienable and imprescriptible; it belongs to the nation." [3]

For others, again, the State is the organized community, a biological reality as alive as an individual;

[2] *Bluntschli*, "Théorie Générale de l'État," Riedmatten translation, p. 18 (2d ed. 1881).

[3] Constitution of 1791, title iii, art. 1.

a vast organism of which individuals are the components, subject to the same laws of birth, development and death as other organisms.[4] Again, it is thought of as an organism and a will, the organism being the support of the will. "The essence of the union which is the State," says Gierke, "is that it contains the sovereign direction of the common will; it is the community of political action; its substance is the common will; its exterior form, organized power; its function, the conscious following of a purpose. . . . A true State comes into existence as soon as a particular organism of State life appears."[5] Says Gerber: "The power of the State is the power of willing of a moral organism conceived of as a person. It is not an artificial and mechanical assemblage of several individual willings, but is the collective moral power of the people, conscious of itself."[6]

[4] *R. Worms*, "Organisme et Société," especially pp. 5 and 17, 1896; *Novicow*, "Annales de l'Institut International de Sociologie," 1897, pp. 192ff.; *Lilienfeld*, "Méthode Organique en Sociologie," ibid. 1894, pp. 39ff.; "Pathologie Social," 1896. See an interesting critique of the organic doctrine by *Tarde* in RP 1896, vol. i, p. 637, and the discussions at the sociological congress in the *Annales de l'Institut de Sociologie*, 1898. Cf. *Van Krieken*, "Die Organische Staatslehre," 1873; *Jellinek*, "Das Recht des modernen Staates," vol. 1, "Allgemeine Staatslehre," pp. 132ff.

[5] *Gierke*, "Die Grundbegriffe des Staats," in *Zeitschrift für die gesammte Staatswissenschaft*, 1874, vol. xxx, p. 160.

[6] "Grundzüge des deutschen Staatsrechts," pp. 19, 218, 225, 3d ed., 1880. See also *Preuss*, "Gemeinde, Staat, Reich, als Gebietkörperschaft," especially pp. 137-173, 199-232, 1889. *Hauriou* writes: "The metaphysical tissue of the State is society, so far as it is based on abstract ideas, on reason, on justice, on the ideal." "La Science Sociale traditionelle," p. 355, 1896. See also "Précis de Droit Administratif, La Théorie de l'État," pp. 1ff., 3d ed., 1897, and "Leçons sur le Mouvement Social," 2d appendix, p. 144. These different works contain ingenious conceptions which are often mystical, and, we fear, not at all scientific. The theory of tissue is not reproduced in the fourth edition of the "Précis de Droit Administratif," published in 1900, in which *Hauriou* defines the State (p. 6): "A society which has engendered in itself a public organization and which conforms thereto through sovereignty." "This definition," adds the author, "brings out three fundamental elements of the State, a society, a public organization, a sovereign person in which is incarnated the political power."

Still others affirm the collective personality of the State without explaining whether its character is metaphysical or organic. The State for them is a legal person, a subject of law. The State enters into legal relations with other States, collectivities and individuals; hence it is a subject of law, a person. "The theoretical foundation," writes Jellinek, "of the legal conception of the State is the indubitable natural and historical reality of a people dominated by a power established in a definite territory. . . . Personality is the capacity of being owner of rights,— in a word, legal capacity. It does not belong to the world of things-in-themselves; it is not a reality, but a relationship of one subject to another, a relationship of legal order. . . . Personality is not the foundation, but the result of the legal community. . . . The conception of the personality of the State is confirmed by the fact that it alone can give a satisfactory explanation, from a legal point of view, of the manifestations of public law. It alone makes it possible to conceive of international law in legal terms." [7] Finally, our learned

[7] "System der öffentlichen subjectiven Rechte," pp. 20, 26, 27, 32, 1892. In "Allgemeine Staatslehre," *Jellinek* writes (p. 150): "The State may, then, be conceived only as a subject of law, and should be connected with the idea of a corporate body ['Körperschaft']. Certainly men are the substratum of the body, men who form a collective unity whose directing will is established by the members of the collectivity. The notion of corporate body, however, is purely legal, to which, as to all legal notions, nothing objectively perceptible in the world of fact corresponds; it is a form of legal synthesis to express the legal relations of the collective unity, its relation with legal order." It is the same idea which *Michoud* is trying to express when he writes: "For the science of law, the notion of a person is and should remain purely juridical. The word signifies simply a *subject of law*, capable of having subjective rights belonging to himself, nothing more, nothing less. . . . We should see in the notion of personality a general notion which is common to public and private law. . . . Every right must be attached to a subject capable of possessing and exercising it, either himself or by agents. If this is true of property and of other private rights, it is also true of the rights of sovereignty which belong to the State." The conclusion is evident. The State is a subject of law, it is a person, it can only be the

colleague Esmein says: "The State is the legal personification of a nation; it is the subject and the basis of public authority. . . . This authority, which naturally recognizes neither a superior nor a competing power in the field it rules, is called sovereignty. . . . The ideal and permanent subject or possessor of this sovereignty, which personifies the whole nation — this moral person, is the State, which is thus identified with sovereignty, its essential quality." He adds, " It is an abstract idea, but one full of consequences and the product of a long historical development." [8]

2: These Doctrines of State Personality are Fictions. All these doctrines, whatever the authority and ingenuity of their defenders, are mere hypotheses and fictions — when they do not run in a vicious circle. Jellinek declares that the world of the jurists is not the world of theories, but of action, of practical life, "a world of things for us, not of things-in-themselves." [9] He is right, but is not the assertion of the existence of a collective personality behind the actions and the practical life of individuals, an affirmation of a thing-in-itself, the creation of hypostases,[10] the personification of what is only the manifestation of a force? Only on condition of keeping within the world of reality can a science exist. And the realities are men, — men who have

collectivity personified; in this character only can it have, and in this character it has, the right to command. *Michoud*, "La Notion de la Personnalité Morale," RDC 1899, vol. 1, pp. 8-12ff. See also *Bernatzik*, "Kritische Studien über den Begriff der juristischen Persönlichkeit der Behörden insbesondere," *Archiv für öffentlichen Recht*, vol. v, 1890, esp. pp. 204ff.; *H. Rehm*, "Allgemeine Staatslehre," in *Marquardsen's* "Handbuch des öffentlichen Rechts," part 2, pp. 149ff., esp. p. 156, 1899.

[8] "Eléments de Droit Constitutionnel," p. 1, 2d ed., 1899.

[9] "System der subjectiven öffentlichen Rechte," p. 15, 1892. In "Allgemeine Staatslehre" *Jellinek* declares (p. 145): "To the notion of law, as such, corresponds no reality outside of ourselves." We will never admit that. It would be a singular science which had for its object notions which did not correspond to any exterior reality.

[10] Ibid. p. 31; "Allgemeine Staatslehre," p. 150.

common needs, who have different talents, who exchange services, who have always lived in common and have always exchanged services; who, because of their physical nature, can only live in common and by exchange of services; men some of whom are stronger than others, of whom the stronger have always used compulsion on the weaker; men who act and who act knowingly. These are the facts, beyond them are nothing but fictions. Men in groups form, it is said, a living organic being, thinking, willing, and distinct from the individuals who compose it. But no one has seen it. Volumes have been written in an unsuccessful attempt to prove its existence. Behind these individual wills and consciousnesses, there is, it is averred, a collective will and consciousness, distinct from those of the individuals. It is true that a certain number of men in the same epoch have the same wishes and thoughts; but does that make a will or a consciousness which is not merely the sum of individual wills or consciousnesses? Even admitting the impossible hypothesis that all persons in the same group think and want exactly the same thing, would there result a will or a consciousness apart from those of the individuals?

But, it is objected, the object of this will differs from the objects of the individuals, hence it is a will distinct from individual wills. Not at all. The will of an individual, though set on a collective purpose, remains the will of an individual. Who affirms this alleged collective consciousness? The individual himself. His very affirmation is the act of an individual consciousness. That the individual thinks of himself as solidary [11] with other men; that the first act of human consciousness may have been the thought of social solidarity,— this

[11] ["Solidaire" in French implies much the same relation as that of our partnership, *i.e.* community in gains and losses. —TRANSL.]

is possible, even probable; but it was an act of *individual* consciousness. We can be sure that an individual thinks and acts; we can be sure of nothing else.

But behind the thoughts and acts which appear to us as the thoughts and acts of individuals, there exists, it is said, the essence of the community. No one is sure of this. To affirm it is to formulate a metaphysical hypothesis, — to reason like the physicists or the physiologists who see the phlogiston and the vital principle behind the phenomena of nature and of life, or the psychologists who, beneath psychic phenomena, affirm the existence of a thinking substance, of an immortal soul — assuredly a consoling belief, doubtless a religious affirmation, but not a scientific fact.

3: Personality Not Necessary to Support Public Law. It may be argued that if the State has no personality, the system of public law goes to pieces, and there is no public law. But this would be a singular course of reasoning. "There *must* be public law, so the State *must* be the personification of the community." The partisans of this theory should begin by proving the necessity of public law, which they have not done. The vicious circle is closed. Can it be shown, moreover, that public law is possible only if the State is a person? Legal relations, affirmed a priori, are based on what are called subjective rights, that is, on powers belonging to subjects. In order, then, that there be a public law, there must be subjective public rights; for this there must be subjects of law; the State has subjective rights, hence it is a subject of law, a person. This argument should have been prefaced by proof that what one calls the State has subjective rights. The very idea of subjective rights is a priori. For centuries it has been affirmed that men, as individuals, have rights, and all theories of law have been constructed on this hypothet-

ical affirmation. In the 1700s, the doctrine of the law of nature appeared to make this conception definite; and all contemporary jurists, even those who wax most sarcastic over the law of nature, are inbued with it. They see in the law only the relation of two subjects of law, two persons. These subjects of law must therefore be created even if in fact they do not exist, and so the personality of the State was conceived. But first of all it should have been inquired whether these pretended subjective rights are real, — whether this world of subjective rights is not artificial and inane, — whether all these arguments were not empty scholasticism, a display of cleverness without real importance. Furthermore, an admission of the nullity of all these doctrines has escaped from the pen of Jellinek himself, one of the most authoritative defenders of the personality of the State. Wishing to explain the difference between a representative and an organ, he writes: "Behind the representative is another person; behind the organ, nothing." [12] Again, "The State can exist only by means of its organs; if we imagine the organs suppressed, there remains no State as the support of its organs, only a legal nullity." [13] If there be nothing behind what are termed the organs of the State, then the personality of the State is a pure fiction; there is really nothing but organs, — that is, individuals who impose their wills on other individuals with the sanction of material coercion.

§ 178. *The State Limited by Law.* 1: LAW IS BASED ON THE COINCIDENCE OF SOCIAL AND INDIVIDUAL PURPOSES. Human groups based on community of wants, on diversity of individual capacity, on reciprocal service; within these groups, certain individuals stronger than the rest, either because they are better armed, or

[12] "System der subjectiven öffentlichen Rechte," p. 29, 1892.

[13] "Allgemeine Staatslehre," p. 512, 1900.

because a supernatural power is attributed to them, or because of their wealth, or their number and ability, thanks to this greater force, to compel the obedience of the rest,—these are the facts. We are entirely agreed that the designation "State" be given to a body of men, dwelling on a determined territory, of which the stronger impose their will on the weaker, or that this power of the stronger over the weaker be termed political sovereignty, but to go further is to enter the region of hypothesis. The assertion that the will of those who command is compulsory on individuals only because it is the collective will, is a fiction conceived to justify this power of the strongest, an ingenious fiction invented to legitimize force by those exerting it, but it is nothing more. "Policy of power,"[14] says Jhering referring to law, "policy of power" say we of this fiction, called the collective will. A dangerous policy, for it creates and maintains the ancient conflict between the individual and the State, as the personification of the community, between the interests of the individual and those of the community,—a conflict which can only end, we fear, if this policy be continued, in the triumph of collective tyranny or of individualistic anarchy. We shall try to show that there is not, and cannot be, opposition between individual and collective interests, between the individual and the State, that the interests of all and of each one are strictly solidary, that collective purpose coincides completely and permanently with individual purpose; that, making use of the expression of Karl Marx, "The free development of each one is the condition of free development for all"[15]; that as social order develops, each man

[14] *Jhering*, "Law as a Means to an End" (volume v in the present Series), p. 283, cf. p. 185 ("Der Zweck im Recht," v. i (1877), pp. 250, 255, 367).

[15] *Marx* and *Engels*, "Manifeste du Parti Communiste," p. 41, French ed. According to the Manifesto, this will only come to pass after the fall of the old bourgeois society with its class antagonisms. If

becomes more individual, and inversely as well increasing individuality aids social order[16]; in other words, that the *individual* and the *collective* blend into one, for the greater the freedom of the individual, the stronger the bonds of society, and conversely. The State is, then, not at all that collective person, representing collective rights against individuals; the State is a community in which there are men whose duty it is to employ their material force in perfecting social organization by protecting the individual, and in protecting the individual by perfecting social organization; at least there are these stronger men. In our thought, then, of political power as the power of the strongest, a plain fact, there is contained, nevertheless, a rule which is just as obligatory for these strong men as it is for the rest. This rule is the rule of law. Our work is to show its foundation, its character and its range. We shall see that it is at once social and individual, permanent as to its principle, essentially changeable in its application. Based on the coincidence of social and individual purposes, this rule finds a first expression in the human consciousness, a completer expression in custom and in legislation, and its realization through material coercion by the State, which accordingly is nothing but force put at the service of law,—not at the service of a claim of subjective right, but of a social rule for individual consciences and wills.

2: LAW EXISTS WITHOUT, IS ABOVE, AND LIMITS THE SOVEREIGN. Though denying subjective individual rights and those pretended natural rights based,

it be true that in social relations the free development of the individual be the condition of the free development of all, it would appear to be as true before as after the triumph of the working class. But do not touch Karl Marx, he is a god whose temple is closed to the profane.

[16] *Jaurès*, "Socialisme et Liberté," in the *Revue de Paris*, Dec. 1, 1908, p. 481.

according to Henry Michel, "on the high dignity of the human being," [17] we do not reach the deceptive conclusions of the German realistic doctrine, whose most accredited representative Seydel writes: "This truth is unquestionable, there is no law without a sovereign, above the sovereign, or besides the sovereign; law exists only through the sovereign." [18] On the contrary, we think the law exists without the sovereign, and above the sovereign. We equally repel the doctrine defended by Jellinek of the *self-limitation* of the State, which seems to have seduced some of the most distinguished representatives of the young French School. Says Jellinek: "Just as the State possesses the faculty of *self-determination*, so it possesses that of *self-limitation*. . . . In virtue of self-limitation, the State becomes moral instead of physical force, its will rises from unlimited power to a power juridically limited as regards other persons." [19] The explanation is ingenious, but it does not solve the problem. This self-limitation of the State is purely illusory. The limitations which the State puts on itself will be dictated by its own purpose, by custom, by public opinion. These limitations are ethical, political, economic, they are not juridical.[20] We deny all this, and we believe firmly that there is a rule of law above the individual and the State, above the rulers and the ruled; a rule which is compulsory on one and on the other; and we hold that if there is such a thing as sovereignty of the State, it is juridically limited by this rule of law.

[17] "L'Idée de l'État," p. 646, 1896.

[18] "Grundzüge einer Allgemeinen Staatslehre," p. 14, 1873.

[19] "Gesetz und Verordnung" p. 198, 1887. Cf. "Die rechtliche Natur der Staatenverträge," pp. 9ff., 1880, and "Allgemeine Staatslehre," pp. 331ff., 1900. See *Le Fur*, "État Federal et Confédération d'États," pp. 434ff., 1896.

[20] *Saripolos*, "La Démocratie et l'Élection Proportionnelle," vol. i, p. 278, 1899. *Jellinek*, "Allgemeine Staatslehre, p. 213, 1900; see nevertheless ibid., p. 336.

Law, if it is anything, limits individual wills, and that which is termed the will of the State is at bottom but the will of a certain number of individuals. This limitation of the State is both positive and negative. Some things the State is obliged to do, other things it cannot do. To determine the principle of this double limitation is the province of legal science; to express it in words and to provide it with a practical sanction is that of legal art. If this is too much for legal science and legal art, their study is not worth a moment's effort.

3: LAW NOT BASED ON THE NATURAL RIGHT OF THE INDIVIDUAL. This principle of a rule limiting the power of the State positively and negatively, we have already said, cannot be found in individual right anteceding the State. The right of the individual is a pure hypothesis, a metaphysical affirmation, it is not a reality. It implies a social contract at the origin of society, a manifest contradiction. Those who explain society by contract forget that the idea of contract could only come to the minds of men living in society; contract is born of society, not society of contract. If law is thought of as a subjective power belonging to subjects of law, then, necessarily, persons appear in their relations as subjects of law, and the State must be treated as a subject of law, the arbitrary personification of the community; there then result those artificial and decrepit theories at which sociologists and philosophers so justly rail. The reason why our modern legal systems, especially our legislation affecting private rights, is in daily conflict with new needs, why it accommodates itself ill to the tendencies and aspirations of modern life, is just because it rests wholly on this notion of subjective right. Of course, a whole young French school is trying to adapt the antiquated codes to new needs

by a looser interpretation.[21] The work is praiseworthy, but can come to nothing. The whole building is falling to pieces and they are trying to buttress it and to repair the façade. Its final fall may be put off, but it is inevitable. Our codes are based on individual right, and law is social, exclusively social. The modern man feels or conceives of law and rights as a social product. This antinomy between positive law systems and the modern conscience is, in our view, one of the profoundest causes of the present social unrest.

4: The Declaration of Rights of 1789. We do not mean that the doctrine of the natural rights of individuals did not appear at the proper time and did not render a great service. It first proclaimed that the power of the State is limited by law, and this will remain the eternal honor of the French Revolution. When, in August, 1789, and in September, 1791, the deputies in the States-General affirmed that the power of the State is not unlimited, that the legislator himself cannot do everything,[22] they were greater than Napoleon at Wagram or at Austerlitz. But with an artificial principle as point of departure they could only perform an incomplete work. They did not perceive that these limitations on the State are not fixed, but on the contrary are infinitely variable, changing with periods and countries; for example, if the State may, at certain epochs, forbid associations of individuals, at others the rule of law, on the contrary, obliges it to respect all associations. It is especially to be noted that, while the power of the State may be negatively limited by the theory of individual rights, its positive obligations cannot be determined on any such principle. Without

[21] See especially *Planiol*, "Traité Élémentaire de Droit Civil," p. 38 in particular, 1900; *Gény*, "Méthode d'Interprétation et Sources en Droit Privé Positif," 1900.

[22] Const. 1791, title i, § 3.

doubt Henry Michel does consider, on the other hand, that this doctrine if correctly understood may be the basis of both the negative and positive obligations of the State,—of the obligation of public aid, for example.[23] This we do not believe. If the individual has rights because he is a man, he can only have those which he gets by nature, or, adopting the expression of the eighteenth century, he has the rights of the *natural man*, and no more. The community cannot touch those rights, or at most only so far as is necessary to protect the rights of all. This power it has, and a man has only those rights which he holds on account of his personality, "his eminent dignity." The right to relief is a social right, that is, a right which can have none but a social origin. By the pure individualistic doctrine, man cannot impose this right on the State, for, if he could, he would hold it from the State, from the community, which would be a clear negation of the individualistic doctrine. The positive obligations of the State cannot be based on the doctrine of individual rights; but these obligations exist. The State should be not simply a "police State" or a "law State," but also a "culture State," to use well-known expressions[24] which show our thought clearly. We will add, however, that police, law, culture, are one and the same thing; they designate

[23] *Michel* considers that the doctrine of individualism, rightly understood, leads to the recognition, as duties of the State, of positive obligations, like public aid, education, and of correlative rights of individuals to be aided and educated ("L'Idée de l'État," pp. 93, 466). We admit unhesitatingly that these are obligations of the State; but we doubt if they can be derived from individualism, without stretching that doctrine into a negation of itself. If the authors of the Declaration of the Rights of Man of 1793 recognized the right to aid, the right to work, and the right to education, as articles 22 and 23 of the Declaration seem to prove, it is yet to be proved that when they did so they were thinking as individualists.

[24] See particularly *Gierke*, "Die Grundbegriffe des Staats," in *Zeitschrift für die gesammte Staatswissenschaft*, vol. xxx, p. 161, 1874; *Gneist*, "Der Rechtstaat," 1872, and 2d ed. 1879.

the mass of the positive and negative obligations which rest upon the State, or more correctly, upon all the individuals in a social group, the strong and the weak, the rulers and the ruled. The State is material force, whatever be its origin; this force is and remains a simple fact, but it becomes legitimate if those who control it use it to accomplish the negative and positive obligations which the legal rule imposes on them, — that is to say, use it in the realization of legal right. Law is not, following Jhering's expression, the policy of force, it is the limitation of force.

§ 179. *The General Notion of the Rule of Law.* 1: Law is Obligatory Because It is a Fact. We propose in this book to seek for the foundation of this rule of law. It cannot be in the individual; it can, then, only be in society. But this law is not a power of the community any more than it is a power of the individual. It is an objective rule. It is not, however, Kant's categorical imperative, neither is it the moral rule of the Utilitarians or hedonists. It is a rule of fact, a rule which men possess not by virtue of any higher principle whatever — good, interest, or happiness — but by virtue and perforce of facts, because they live in society and can only live in society. In a sense it is the law of social life. This rule does not admonish the individual, "Do this because it is good, because it is useful, because your happiness depends on it"; it says, "Do this because this is." It depends not on a higher principle, but solely on reality. It came into being as soon as men began to live in society, and it will exist as long as society continues, unchangeable in its basis, variable in its application. It is the law of the social man, because the facts are as they are. The individual feels it or conceives the rule, the sage formulates it, the positive legislator declares it and guarantees that it be respected, and is

himself subject to it because his statutes are nothing unless they are the expression of this rule applicable to everybody.

2: THE RULE OF LAW NOT A LAW OF CAUSALITY, BUT LIKE NATURAL LAWS. Yet this social rule, as we conceive it, is not a law in the same sense as the laws of the physical or biological worlds, that is, a law expressing a simple relation of succession between two phenomena. Physical and biological laws are laws of causality; the social rule is a law of purpose. The organic doctrine, lately much in vogue, which we freely admit temporarily seduced us, looks on social phenomena as identical with biological facts, though more complex, and as subject like them to the laws of life. There has been talk of social biology, even of social statics and dynamics.[25] These systems came at their appointed time and did their work; they showed the nullity of the theory of individual rights, they established the point that society is not an artificial fact, produced by the will, but on the contrary a spontaneous, natural fact. Their mistake was in trying to identify social facts with physical and biological phenomena, whence their present discredit. It is impossible to avoid the point that the essential factor in social facts is man himself, a creature who knows what he is doing and who can say that he knows. It will never be proved that the forces of nature and of life are conscious of themselves. It may be that they are, no one knows, no one will ever know; it is possible that they are, as everything is possible, but no one can show it, while an individual consciousness is

[25] These expressions are those of *Comte*, but they have been given a breadth which they certainly did not have in the mind of their author. *Alengry*, "Essai Historique et Critique sur la Sociologie d'Auguste Comte," pp. 231, 244ff., 1900. Cf. *Hauriou*, "Le Mouvement Social," 1899, which tries to explain society by the principles of rational mechanics and the laws of thermo-dynamics. Cf. RMM, March and May, 1879 (criticisms by *Bouasse* and *Hauriou's* answer).

patent in every act of a human being. Is this force free? No one knows, but it is certainly conscious. It is also certain that a man feels that he is moved by purposes. Perhaps human actions are really determined by causes, but man acts as if he was determined by some purpose. Does he freely choose this purpose? Perhaps; in any case, he chooses it consciously. Natural phenomena appear to us as determined by causes, it makes little difference whether necessary or contingent. Human action seems to be determined by purpose, perhaps chosen freely, but certainly chosen consciously.[26] This is why the social law [loi] is a law of purpose; every purpose is legitimate which conforms to the social law, and every act done to accomplish such purpose has social value, that is, juridical value. The rule of law [droit] is, then, the rule of the legitimacy of purposes, and this differentiates it wholly from physical or biological laws, which are laws of the relations of cause and effect. The rule of law may then be termed a rule of conduct, since it applies to conscious wills, since it determines the relative value of the conscious acts of men. It is not, however, an ethical rule any more than it is a physical law, because it does not determine the value of individual actions in themselves.

3: The Juridical Act and the Legal Situation. We must discover the principle of and the formula for this rule. Everything comes from it. An act has not a juridical value because it has behind it a subject of law; such a person cannot always be unearthed, for the very good reason that he never exists. An act has juridical value because the will which caused it was

[26] *Jhering*, "Law as a Means to an End" (Modern Legal Philosophy Series, vol. v), pp. 1ff., 17–18 ("Der Zweck im Recht," v. 1 (1877), pp. 1ff., 23–25). For the distinction of laws of purpose and of causality compare *Jellinek*, "Allgemeine Staatslehre" (1900), pp. 17ff., 123; *Laband*, *Archiv für öffentliches Recht*, v. ii, p. 317 (1887).

determined by an end in conformity with the rule of law. The old idea of the bond of law—the "vinculum juris"—is disappearing, the legal relation is vanishing. A human fact, that is to say, a fact brought about by the act of an individual will, is all that there is. This fact is a legal fact, if it is in conformity with the rule of law; and in this case a person controlling a material force will make a legitimate use of his force in realizing this act of will. One says that there then exists a legal situation. This is a supple and prolific conception marvelously adapted, as we hope to show, to the needs of modern societies; a protective conception, for though it cannot justify the origin of the State, it can limit its power and activity and mark its obligations; a practical conception, for it does away with long, vain controversies about juridical personality.

§ 180. *Definition of the State.* Such are the general ideas which have inspired this book, in which there will be much question of the State, of objective and subjective law, and of public law. The "State"—we shall use the word to conform to usage, but it goes without saying that in our thought this is not the personified entity which it is usually taken to be. For us the State is man, the group of men, who in fact in a society are materially stronger than the others. The State is no more than that, and that is what it has always been and always is, whatever be its form, whether material power be held by one individual, by several, or by a majority. The idea of a material power legitimate by reason of unanimity is a fiction, for if every one wanted the same thing there would be no use in commanding it and in forcing people to do it. Such a condition would be the negation of the State. That social fact called the State would no longer exist. Objective and subjective law, expressions which have been used and abused, are only half

satisfactory. We adopt them, nevertheless, because they are convenient; they are well enough if their meaning is understood. The German school, followed faithfully, we regret to say, by the young French school, desires to separate completely and absolutely public and private law. We protest against this conception. We do not deny that in practice there is a place for a distinction between the law termed "private" and that termed "public," a distinction arising from the difference in practical sanction. If, however, law exists, it is always the same, because it rests on the rule of law, which has always the same basis. There is only one law, as there is only one justice, and we fear that for many of the German schools this rigorous distinction between public and private law is merely an ingenious way of giving a juridical appearance to the absolute power of the State.

§ 181. *Importance of Keeping Close to Realities.* It may be found that, in these studies, which, we think, should keep as close to reality as possible, we have used the deductive method too largely, and that we have not entirely succeeded in getting away from that scholasticism with which jurists have been imbued for centuries, and which has been the ground of so much just reproach. The deductive method seems to us nevertheless legitimate, if it is used only as an instrument of discovery. We have intended to use it in this way, and to see nothing more than hypotheses in the conclusions to which it leads us, in so far as they are not confirmed by facts. The world of law is not that shut-in world shown us by certain jurists, an ideal world apart from reality; it is a world of tangible facts which must be explained and classified, of human wills which must be understood in their concrete manifestations; it is the social effect which they produce, the material force which they set

in motion and which must be determined and estimated. Our efforts have all been towards this end.[27]

Nevertheless, might not the objection be made that we have neglected facts, since in this whole book there is no consideration of the various forms of the State in various epochs and different countries, and that our study is consequently purely abstract? Such a criticism would not seem to us well founded. The method of observation does not prevent us from classifying the facts, from distinguishing them without isolating them from others with which they are mingled. The imperfection of the human mind obliges us to do this. Now the only fact which we are studying is the fact of a conscious material force which certain individuals claim the right of using to control others, and by means of which they do actually control them; this fact, in itself, remains always the same, whatever be the method of government of the powerful. The character of this material, conscious force depends not on the position or number of those who control it, but wholly on the *materiality* of the force and on the purpose which has set it to work. Or in other words, the State, whatever may be its exterior form, monarchy, aristocracy, or democracy, always has the same powers and the same duties, no more, no less.[28] This fact, the State, so under-

[27] On the question of method in public law, see *Deslandres*, "La Crise de la Science Politique," in RDP 1900, v. i, particularly pp. 249 and 435. The author criticises very justly the so-called juridical method, and very severely what he terms the sociological method. But in this last point the criticism seems to us to apply to the insufficiency of the results obtained by sociology, to the unproved hypotheses which that science makes the mistake of piling up, rather than to its method, which is and can only be observation.

[28] *Sir Henry Maine* says very justly: "The advanced radical politician of our day would seem to have an impression that democracy differs from monarchy in essence. There can be no grosser mistake than this and none more fertile of further delusions. Democracy, the government of the commonwealth by a numerous but indeterminate portion of the community taking the place of the monarch, has exactly the same

stood, is a fact always identically the same as before, and it is this fact, and this alone, which we want to study. So reduced, the field is singularly vast, the problems are many and difficult; but there are none whose solution interests more directly contemporary society.

conditions to satisfy as monarchy; it has the same functions to discharge, though it discharges them through different organs. The tests of success in the performance of the necessary and natural duties of a government are precisely the same in both cases." "Popular Government," Essay II ("The Nature of Democracy").

CHAPTER IX[1]

SOCIAL SOLIDARITY

DEFINITION OF SOLIDARITY — THE INDIVIDUAL: (1) THE INDIVIDUAL MIND THE BASE OF ALL HUMAN PHENOMENA; (2) THOUGH ITS CONTENT MAY VARY, THE MIND REMAINS THE SAME; (3) WILL AND ACTION; (4) INDIVIDUALS THE ONLY REALITIES IN SOCIAL LIFE — SOLIDARITY BY SIMILITUDE: (1) LIFE IN COMMUNITY LENGTHENS ITSELF AND LESSENS SUFFERING; (2) HISTORICALLY MEN HAVE ALWAYS LIVED IN COMMUNITIES; (3) SOCIOLOGY MUST SHOW HOW THIS FACT AFFECTS MEN; (4) THE WILL TO LIVE THE FIRST BOND OF SOCIETY; (5) THIS BOND PECULIARLY UNITES MAN TO A CERTAIN GROUP; (6) BUT INDIVIDUALITY IS NOT AFFECTED; (7) THIS IS NOT SOCIAL CONTRACT; (8) ORIGIN OF SOLIDARITY BY SIMILITUDE — SOLIDARITY THROUGH DIVISION OF LABOR: (1) MEN HAVE ALWAYS BEEN UNEQUAL; (2) INEQUALITY INCREASES WITH INCREASING CIVILIZATION; (3) BUT THE IDEA OF EQUALITY IS A PRODUCT OF CIVILIZATION; (4) THIS FORM OF SOLIDARITY STRONGER THAN SOLIDARITY BY SIMILITUDE; (5) THIS SOLIDARITY DUE TO THE DESIRE TO LESSEN SUFFERING; (6) OTHER INFLUENCES ON DIVISION OF LABOR.

§ 182. *Definition of Solidarity.* The word "solidarity" is to-day singularly abused. There is not a book, a news-

[1] This chapter is largely inspired by *Durkheim's* excellent book, "De la Division du Travail Social" (1893), although we do not accept many of his ideas.

[This chapter=pp. 23-52 (§§ 1-3) of the original work.—ED.]

paper, a meeting, an address or a formal speech, in which it is not frequently repeated. In a word, it is the fashion, and it often serves to hide a lack of ideas. It expresses, however, an idea at once real and full of suggestion, but needing definition. Solidarity has been identified with Christian charity, and with the fraternity of the motto of the French Republic. This is entirely incorrect. Solidarity is both more and less than charity and fraternity. These are moral duties; solidarity is a fact. A clear understanding of this fact may be an incitement to action, may even serve as foundation for a rule of conduct, but solidarity is not in itself a rule of conduct. Christianity tells man to love his neighbors; the motto of the Republic, to treat like brothers other men, his equals, free like himself. The doctrine of solidarity does not admonish; it shows that in fact men are solidary with one another, that is, that they have common needs which they can only satisfy in common, that they have different capabilities and differing needs which they can satisfy only by an exchange of services. Consequently, if man wishes to live, he must act in conformity with the social law of solidarity. Solidarity is not a rule of conduct, it is a fact, the fundamental fact of all human society. It is not an imperative, but if man wishes to live, since he can only live in society, he should conform his conduct to the fact of social solidarity.

Solidarity is thus indirectly the foundation of a rule of conduct: it takes the whole man, his passions, his desires, his egoism and his altruistic tendencies, if they exist, it urges him to develop his own activity as widely as he can; but at the same time it urges him to respect the activity of other individuals, since every limitation of the activity of one reacts on all. It induces him to seek happiness or the least suffering for himself and for

others, because the suffering of one affects all. It is not the ethics of happiness, it is not the reconciliation of egoism and altruism, it is a simple statement of fact, the coincidence of purpose and effect: the unhappiness of one affects all, the happiness of one profits all. The knowledge of this fact is no new discovery, but our epoch will, in history, have the credit of first distinctly understanding it. It is important to analyze the fact into its essential elements.

§ 183. *The Individual.* 1: THE INDIVIDUAL MIND THE BASE OF ALL HUMAN PHENOMENA. In a little book which made some stir, as much by the personality of its author as by the ideas expressed in it, Léon Bourgeois writes:

> "No more than the State, the political form of human community, is Society, the community itself, an isolated being, having an existence beyond the individuals who compose it, and capable of possessing particular rights higher than and opposable to the rights of those individuals. Not between men and the State or Society does the problem of rights and duties arise, but between men alone, between men, however, conceived as associated in a common work, and under the obligations, one to another, which arise from the necessities of a common purpose."[2]

On the whole, this is very simple, almost commonplace; but it is not unimportant that in our epoch of false sociology and of ill understood socialism it has been plainly affirmed by a man of authority and talent, deep in the strife of parties, who understands and sympathizes with modern tendencies. Yes, the one thing which can be affirmed and which should be the basis of all social study is the self-conscious individual mind. The irreducible fact, which is at the beginning of all the phenomena of which man is a factor, is the individual self-conscious mind. The well-known aphorism

[2] *Bourgeois*, "Solidarité," p. 89 (1896).

of Descartes, "I think, therefore I am," has been frequently criticised in modern philosophy. The criticism falls, for Descartes merely stated a fact, the only fact which is incontestable and undeniable, the self-consciousness of the individual of which every philosophical system evolved by the individual mind is a new confirmation. To criticise, to philosophize, is to declare oneself a thinking being. The learned and disdainful theories of our modern philosophers have made no changes. The individual mind exists, and is conscious of itself. Cartesianism is reproached as the father of the individualism of the Revolution, itself the parent of all the ills which afflict our modern society. A truly singular reproach! This is not the place to inquire whether there is a bond of union between the Declaration of the Rights of Man and the "Discourse on Method." Even if these two manifestations of human intelligence were affiliated, if revolutionary individualism has had evil consequences, the fact is not changed. "I think, therefore I am," is not the affirmation of a principle of the doctrine of individualism, it is the statement of an unquestionable reality, the sole unquestionable reality. The "thing-in-itself" of German philosophy is individual thought. We should be tempted to say: The "thing-in-itself" is individual suffering, but at bottom the idea is exactly the same.

2: Though its Content may vary, the Mind Remains the Same at Bottom. The variations of the individual mind are infinite. There is surely an abyss between the mental state of an African savage and of a Newton, a Renan or a Pasteur, but it is always the individual mind, always identically the same. This mind may be subjected to external influence, its content may come wholly from without, human consciousness may be the "tabula rasa" of Condillac. These are all ques-

tions which the philosophers have been learnedly discussing for centuries. Whatever be their solution, the individual mind exists. The content of this mind may be exclusively social. Man has perhaps thought socially, as we ourselves have written, before he thought individually; it may be that he only thinks because he is a social being; the only objective reality is perhaps society. What difference does it make? Even admitting that the content of consciousness is exclusively social, consciousness itself is exclusively individual. The individual self-conscious mind, that is the fact set above and beyond all philosophical or sociological systems. We shall be accused of preaching a simplified philosophy, suitable to polite society. The reproach does not disturb us. The simplest philosophy is still the best, and besides, here it is not a question of philosophy, but of the simple statement of a fact.

3: WILL AND ACTION. The most elementary observation makes another fact certain. This individual mind tends to exterior expression, to action upon the exterior world. This tendency to exteriorization is, if we do not deceive ourselves, an unquestioned and unquestionable law of experimental psychology, which shows besides that this tendency increases the greater the precision of the mind, the clearer the consciousness. This conscious tendency of the mind to act from within to without is the will; the external manifestation of the will is action. Whether there are in the state of consciousness and the act of volition two distinct psychic phenomena, or whether analysis discovers but two successive or concomitant phases of the same psychic phenomenon, is a problem for the psychologists, not for us. Whether this will is free or predestined is a point which has been long discussed without having been proven either way.[3]

[3] *Fonsegrive*, "Essai sur le Libre Arbitre, sa Théorie et son Histoire," 2d ed. 1896.

It is certain, though, that an act of will is always provoked by a certain factor which the individual sees in the future and which is an object. Is it an objective reality or only an illusion of the mind? Does man choose freely among different objects or is he predestined to choose that one which forces itself upon him as the strongest? These are all insoluble questions, whose discussion is a play for the intelligence, passionately interesting, perhaps, but without result. It all comes to this, that man is conscious of his acts, and of the object which he believes decides him to act,—an object which he usually believes that he has freely chosen. This object, we repeat, is not in our thought an objective reality, and we cannot be reproached of falling back into teleological doctrines, which are metaphysical, and indifferent for any realistic and truly scientific study. For us, the object is the result which the individual has in mind in acting, and which he believes impelled him to act. This is not the final cause of Aristotle or of St. Thomas, but a much more commonplace finality. It is a momentary finality, intrinsic, if we may say so, to the individual. It is not natural and general finality, but one purely contingent and individual. It is an immediate result consciously desired, perhaps freely chosen, infinitely varying and changing, apparently highly complex, really exceedingly simple. It is object as Jhering understands it,[4] and to borrow his language, it is the "ut" which determines every act of the human will:

"The insane person also acts (so far as his doings may lay claim to this name) not without purpose. His actions are distinguished from those of the rational person, not by the want of purpose, but by the peculiarity and abnormity of the purpose. . . . Even habitual action, in which we no longer do conscious thinking at all, is

[4] *Jhering*, "Law as a Means to an End" (vol. v in this Series), p. 18.

still purposeful action. . . . But the frequent repetition of the same action, from the same motives and with the same purpose, has bound together purpose and action to such a degree that the purpose has ceased to be a consciously perceptible element of the voluntary process."[5]

4: INDIVIDUALS THE ONLY REALITIES IN SOCIAL LIFE. Self-conscious human beings, who think, who will, who act with a known object in view, these are the only realities of social life. All philosophy, all law, all ethics, all politics — in a word all sociology — must begin with them. Any system which neglects or denies either in its beginning or in its result, the individual ego, is condemned in advance; for it neglects or denies the only undeniable fact, the only fact which cannot be denied, for even to deny it is to affirm it, since negation is a self-conscious thought whose formulation is an act of will determined by a conscious end.

5: INDIVIDUAL CONSCIOUSNESS GROWS MORE SOCIAL, BUT IN ESSENCE REMAINS INDIVIDUAL. It is, however, evident that, while the individual consciousness is the one reality, it grows with the growth of its content. Man becomes more a man as he thinks more clearly on more subjects, or his range of desired objects widens. There is a larger assertion of individuality as the range of consciousness clears and extends. Development of the content of consciousness does not change its character, however; it expands into a more comprehensive reality, it remains individual consciousness. The will develops more complex and stronger desires, it remains the individual will. Action becomes more frequent and is oftener repeated, it accomplishes more in a shorter time, but it remains individual action. Though a man be conscious not only of himself, but also of the ties which unite him with other men, though he think of

[5] Id., pp. 14-15.

himself not merely as autonomous, but as solidary with others, his state of consciousness is still individual. Though his will and his action be determined not alone by his own personal interest, but by an interest common to many others, they remain individual. The more he thinks the more he wants, the more he acts the fuller his manhood. Consequently the better he understands human solidarity, the more he wants, the more he acts towards, its realization, the wider grows the field of his consciousness, the greater grows his individuality. He does not turn into Nietzsche's superman, he remains simply man; he becomes more man because he becomes a higher individuality. The opposition of socialism and individualism, in the current meaning of these words, has no basis in reason. When a man becomes more social he becomes more individual, since he thinks and wants more things, and if he becomes more individual he becomes more social.[6] This leads us to define the idea of human society.

§ 184. *Solidarity by Similitude.* 1: Life in Community Lengthens Itself and Lessens Suffering. The human ego has for its support an organized living being. What is life, what is organic matter, what is an organism? — so many questions which are insoluble or at least have only the negative answer: a living organized being is a being which dies. Does this mean that we know what death is better than we know what life is? Assuredly not, but the effect is simpler, consequently easier to grasp. One is in the habit of applying the word "death" to a certain phenomenon recognized by a few easily known characteristics. To say that a man is a living and organized being is to say that he is a

[6] *Gide*, "L'École Nouvelle" (1890), address at Lausanne; see however *Durkheim*, "Représentations Individuelles et Représentations Collectives," in RMM May 1898, p. 273, and the discussion of the article by *Roblot* in RP December 1898, p. 430.

mortal being. It is, however, an observed fact that man dies earlier if he lives isolated from other men. Besides, man suffers. Suffering is not a vain word, as the Stoics would have us believe; it is a reality, the most unquestionable reality. It is a teaching of observation that the sum of human suffering is less when man lives in relations with other men. We are well aware that philosophers prove very learnedly that happiness and suffering are subjective and relative, but only by closet reasonings.[7] In fact, man suffers, knows that he suffers, wants to suffer less, and in fact does suffer less if he lives in a community with other men.

2: HISTORICALLY MEN HAVE ALWAYS LIVED IN COMMUNITIES. From another point of view, these human groups exist and have always existed. Observed facts do not justify the assertion that at any historic or prehistoric period men lived alone. The natural man of La Boétie, Locke, and Rousseau never existed. We do not say that he never could have existed, for what is possible, what impossible? Just as Renan denied miracles with the argument that a true miracle had never been scientifically proved,[8] so we deny the existence of the natural man in the sense of the philosophy of the 1700s, because it has never been scientifically proved. Human communities are facts of the same type as herds or flocks of animals,[9] primary, irreducible and spontaneous. It matters little whether the fact be physical, biological or superorganic,— these classifications are arbitrary, the fact is constant. Human beings do not live alone, they live in company with others. Their

[7] See notably the keen analysis of the idea of happiness in *Durkheim's* "Division du Travail Social," pp. 255ff. (1895).

[8] "Vie de Jésus," preface, p. vi, 17th ed. 1881; cf. *Renan*, "Examen de Conscience Philosophique," in "Feuilles Détachées," p. 401 (1892).

[9] *Espinas*, "Sociétés Animales," particularly Introduction, p. 8, and Conclusion, p. 539, 2d ed., 1878.

relations are characterized by a permanence which impresses the observer, and they appear in an infinite number of forms varying with the period and the country, but the characteristic of the fact is always apparent, and the observer can always grasp it, isolate it, and express it, disentangling it from the facts which precede, accompany, or follow it.

3: Sociology Must Show how this Fact Affects Men. The sociologist cannot limit himself to this statement. This fact of human communities contains the factor of the man himself, conscious, individual, and willing. So what social science should determine is less the fact of conmumity itself, than the form in which it is reflected in human consciousness, and its action on the human will. It is essential that this be well understood. We have already said that it is wholly incorrect to apply the concepts and methods of physical and natural science to the study of social facts, that these are studies of an entirely different order, because we cannot say that there is consciousness behind the phenomena of nature, while, on the contrary, we can say that the principal element in social facts is a conscious being — man. We touch here the accuracy of observation. It seems quite evident that if the sociologist considers the human community as the physiologist or the physicist observes a natural phenomenon, he will see only a part of it — his observation will be incomplete. What should interest him above all, what should determine his conclusions, is the way in which this fact appears in the human consciousness, the reaction of this fact on human decision. So finally, all social facts may be said to be facts of consciousness. How do men think of the human community? What does a man want when under the influence of this fact? This is the real question.

4: THE WILL TO LIVE THE FIRST BOND OF SOCIETY. Individual states of mind on this point have been infinitely diverse and complex. Always and everywhere, varied elements have contributed to the formation of these states of consciousness, elements interior and exterior, elements which cannot be enumerated and determined. Never have they been more complex and diverse than in our own times, never more confused with one another; yet an observer will find presently a sentiment both sufficiently simple and sufficiently general to be found again in every human consciousness in every epoch,—the sentiment of individual life, which, in defining itself in the consciousness of the individual, becomes a thought tending to exterior expression and gives birth to the will to live. Perhaps this sentiment grows complicated in highly civilized societies, and becomes deformed in some refined spirits,[10] but at bottom it remains universal and unchanged. It appears especially as that constant aspiration of man to lessen the sum of his suffering, to experience the least evil; it is not a quest for happiness — the philosophers may be right, happinness may be absolute and unknowable — but to lessen the suffering of the moment. The consciousness of individual life brings with it the *will to live;* that is, the will to escape everything which is destructive of life, or, what is the same thing, to lessen the sum of human suffering. This consciousness of an individual life and this aspiration towards the least evil are inherent in all men everywhere and always. This community of sentiment and tendency constitutes a first bond between them. It is the consciousness of human solidarity in all its generality, but it is and remains the consciousness of individuals. The common sentiment of the similarity of desires and needs is the psychological

[10] *Durkheim*, "Le Suicide" (1898).

form in which appears this union of all humanity. At first obscure and isolated, sporadic, so to say, this sentiment becomes clearly defined and general with the progress of civilization, and we firmly believe that the consciousness of human solidarity may, in our time, be considered as an integral part of the intellectual inheritance of man. Marion could justly say, "Any intercommunicating group of living beings is a society in the general sense of the word. In this sense, the whole human race forms a single immense society."[11] Nevertheless, this sentiment of human solidarity is an exclusively individual sentiment.

5: This Bond Peculiarly Unites Man to a Certain Group. In fact we may go further. Any one can easily see that certain men are more peculiarly bound to one another than others. In the vast community of humanity, certain more or less coherent groups are distinct from others, and often, nearly always, in mutual strife. Even at a time when men have a definite sentiment of the solidarity which unites them, each one believes even more firmly that he is peculiarly united to a certain particular group. Hence the particular groups which appear to the human consciousness in the same aspect as the whole human community. The social concept becomes clearer and better defined, but it remains individual, and individuality increases in proportion to and simultaneously with the tightening of the bond of social solidarity.

From the moment when, impelled by different influences — a common habitat, origin, religion, danger, common sufferings and victories — the instinct of self-preservation appears to a certain number of men with the same intensity and the same characteristics, when they agree on the way to satisfy it, especially

[11] "Solidarité Morale," p. 156 (1880).

when they feel clearly that they can satisfy these aspirations and desires only by life in common, they then become definitely conscious of a community in their individual thoughts. In those who are thus brought together by different and variable circumstances, is born the sentiment of a narrower solidarity, founded in the belief that the members of the group have identical needs, which can only be satisfied by community life. It is nothing more than the eternal desire to diminish human suffering, the quest for happiness on which Aristotle rightly established all his moral and social philosophy.[12] It is not the quest for common happiness, but a quest in common for the happiness of each individual. This grouping of men into communities is a natural fact—the biological school is right—but it appears in the consciousness of the individual, as the double thought that the members of the same group have the same instinct of self-preservation and the same need to lessen suffering, and that this double result can only be obtained through life in common. This double thought is individual. On one hand it proceeds from the strengthening of the social bond, on the other it makes social relations closer; it is both cause and effect. Thus individualization and socialization advance together; man is more closely bound up with a certain number of his fellows, his individual consciousness is widened and becomes more precise; he has grasped a fact that he did not previously understand, that he is solidary with all humanity and more particularly with one group. Widening thus his range of ideas, he widens his personality. To this extension of individuality corresponds a stronger cohesion of the social group, and man becomes at once more social and more individual,—more social because he

[12] Book I, "Ethics"; Book III, ch. 2ff., "Politics."

is brought closer to others, more individual because he thinks on more subjects.

6: But Individuality is Not Affected. He becomes more individual, also, because he wants more things. Will and thought, as has been already observed, are corollaries. Will is only a thought which seeks an external expression, action is only will expressing itself externally.[13] When man understands more things, when he understands them better, he will want more things, his desire for them will be stronger and his external action more intense. As soon as man understood that he had the same needs, the same aspirations for life as a certain number of individuals, and furthermore that he could meet these needs and realize these aspirations only through community life, he desired this community life, and his desire increased the better he understood the conditions of a diminution of suffering and of a more intense life. To the common thought of, and aspiration towards, life, was added the common will to live, and to live in community. This will continues to be an individual will, because it derives from the thought of an individual, and can only be individual, like the concept from which it developed. It is moved to action by an end which, in a sense, may be termed collective, because it is the same for all the members of the group, but which at bottom is an individual end, for it is the desire to lessen individual suffering through community life. Even if it were really a collective end, the will would still be individual, because set in motion by an exclusively individual thought. We see no trace of a collective will, we see men who have identical thoughts, identical desires, all of whom want less suffering and a better life — men who desire to live in community for this purpose; but it is always individuals

[13] See *Blondel*, "L'Action" (1893).

who think and who will. It is always the individual ego which asserts itself and is everywhere; the pretended social ego is nowhere to be found.

7: THIS IS NOT SOCIAL CONTRACT. The individual will to live in community, we say — do we not thus get into the theory of the social contract? Not in the least. The believers in the social contract begin with the natural independence of man, and explain the social community by a convention by which each loses all or part of his natural independence and gains security in return. We, on the contrary, accept society as a natural fact, shown by experience, and we are interested in seeing how the fact appears to the individual consciousness and how it acts on individual will. We do not look upon society as the product of a freely acting human intelligence; human intelligence and will model themselves on society. We do not say society exists because man wants to live in community. Men always have lived and can only live in that manner; as soon as they understood the necessity of community life they desired it, and so became more human because they understood more and wanted more. Further, were the hypothesis of the social contract true, it would not lead to the dogma of the collective will, as Rousseau and the men of the Revolution thought.[14] In contract two or more individuals want the same thing or corollary things, their wills call each other into action; but a single will does not arise from this meeting of wills. There are and there continue to exist as many wills as there are contracting parties.[15] Thus even with the hypothesis of the social

[14] "Instantaneously," says *Rousseau*, "in the place of the particular person of each contracting party, this act of association produces a moral and collective body. . . which receives from this same act its unity, its common ego, its life and its will." "Contrat Social," Book I, chap. vi.

[15] Cf. *Jellinek*, "System der Subjectiven Rechte," p. 194 (1892).

contract, which we vigorously deny, our affirmation remains true: the will to live in community is an individual will, exclusively individual. Imagine millions of men with the same wish, moved by the same purpose — you will not have a collective will. We put aside also the doctrine of a social quasi-contract, which, in these last years, seems to have seduced several distinguished minds, and which is no more than the social contract more or less disguised. Nothing seems to us more dangerous than to carry over into sociological observation these expressions of an antiquated and artificial legal technic.[16]

8: Origin of Solidarity by Similitude. From this discussion it results that the division of humanity into a certain number of groups more or less coherent, more or less compact, always rivals, often hostile, is a natural fact, a consequence of the physical organization of man, and appearing in different forms under the influence of multiple causes. It is not this fact, however, which especially interests the sociological jurist; he must go deeper and see how it is grasped by the consciousness of individuals and how it acts on their wills. Now it appears to us that men, understanding that they all have the same desire for life, the same aspiration toward the least evil, conceive the idea of a vast solidarity which unites them all. Noticing that their own needs correspond more particularly with those of a certain group, they believe that they are especially solidary with the members of that group, and appreciating that alone life in that group can guarantee them the least degree of suffering, they desire the maintenance of such solidarity. There is, then, a primal form of solidarity among men, born of a community of thoughts, needs,

[16] *Andler*, "Quasi-Contrat Social," in RMM July, 1897. For its refutation from the philosophical standpoint, see *Darlu*, id. January, 1898.

and wishes. Men think of themselves as solidary with each other because they have the same needs and consequently the same desires and because they understand that they will suffer the least evil in a community life. We term this primal form of social solidarity *solidarity through similitudes*.[17] It is clear that we do not and cannot understand by solidarity a material bond uniting men — solidarity is a thought of the individual man. It is nevertheless, a reality, — is is indeed a social reality only because it is an individual thought; only the thought of an individual is a thing in itself. This solidarity by similitude unites the men of the same group, and it unites also all humanity; in first treating of the solidarity of humanity we did not in the least intend to imply that man was conscious of the solidarity of mankind before he became conscious of the solidarity of the group, — rather the converse is true, in our treatment we proceeded from the simple to the less simple.

§ 185. *Solidarity Through Division of Labor.* 1: MEN HAVE ALWAYS BEEN UNEQUAL. Men have similar thoughts, desires, and wants, but at the same time they have entirely different thoughts, desires, and wants. They have identical needs, but they have as well different needs. Men are not born equal, they are born different. The absolute natural equality of men was a postulate of the philosophy of the 1700s. The Declaration of Rights of 1789 (article 1) proclaimed that "men are born, and are, free and equal in right," a formula exact enough if it meant that all men have an equal right to the protection of positive law, but wrong if it meant that all men are in fact equal and should consequently play the same rôle in society. The natural

[17] *Durkheim* names it "mechanical solidarity," an expression which is inexact because it seems to imply the application of physical law to society. "Division du Travail Social," p. 73 (1893).

fact, as they called it in the eighteenth century, is not that men are equal, but that they are unequal, and the general tendency of evolution is towards an ever greater inequality. A social group marked by complete homogeneity has never been shown to exist. Such mathematical equality of men must be denied until it is scientifically shown that societies either have existed or exist in which it has occurred or now occurs. According to Durkheim, [18] nevertheless, "Even if it be true that a society has never been observed which responded in every way to this description, its existence may be postulated," because "lower forms of society, those which are in consequence nearest to this primitive stage, are formed simply by multiplying aggregates of this type." The author himself admits that this is no more than a postulate, that is, an hypothesis, the falsity of which is not demonstrated but which is only an hypothesis. In the clan, the differentiation would exist between the groups which compose it, but not between members of each group. Is that not an admission that in the most primitive societies which can be directly observed, there is a differentiation between individuals? To admit that the differentiation only exists between the different aggregates is to say that each aggregate is a reality, and that is to start with an a priori assertion. Anyway, the component parts of the clan are at once the different hordes which compose it, and the individual members of those hordes. If, then, differences exist between the different hordes, there is likewise a difference between the individuals who compose the clan. The fact is not affected by the assertion that the component parts are formed of homogeneous elements. Herbert Spencer seems to us nearer the truth when he says that there has always been one difference between

[18] "Division du Travail Social," p. 189 (1893).

individuals recognized by all, which necessarily has consequences — the difference between men and women. "Men and women being, by the unlikenesses of their functions in life, exposed to unlike influences, begin from the first to assume unlike positions in the community as they do in the family."[19] But the English philosopher would seem to go too far when he tries to show that this difference of sexes formed the first political differentiation, the first distinction between rulers and ruled. This differentiation, as we hope to prove, is only a distinction between strong and weak, and the difference between strength and weakness has not always corresponded to the difference of sex. An infinitude of other circumstances have had a share in it — difference in physical strength, in temperament, in the supernatural power which was necessarily attributed to certain members of the primitive group. However that may be, the fact itself seems beyond any question. No record exists of a human community in which the homogeneity of the individuals composing it was complete and absolute.

2: INEQUALITY INCREASES WITH INCREASING CIVILIZATION. It is true, however, that primitive men must have been more alike than civilized men. Differentiation has progressed in the same measure as civilization, or to be more exact, civilization itself is nothing more than the accentuation of dissimilarities between individuals. Progress and civilization appear to many minds as a steady advance towards a higher ideal, conceived a priori by human intelligence. We, however, observe but one thing, a constantly continuing transformation of men resulting in more ideas, more aspirations, more varied needs for each one, and providing them with means of realizing such aspirations and needs more quickly.

[19] *Spencer*, "Principles of Sociology," 2d ed., pt. v, vol. ii, §454, p. 289.

Increase of needs, and decrease of time needed to satisfy them, constitute progress and civilization. Is there at the same time an approach to an ideal of happiness and justice? That is what we would like to believe, but it cannot be scientifically shown. It is equally evident that if by this evolution, termed civilization, man thinks, wants, and can accomplish more, each man will necessarily differ more from the rest. Every human individuality becomes more complex and therefore will be less like the others. The two Iroquois of whom Durkheim speaks[20] are sensibly equal, their states of consciousness are sensibly identical, if we compare the slight differences which distinguish them from one another, with the wide divergence between two Frenchmen of the twentieth century. Every man, every modern man in particular, has his own capabilities, aspirations, and desires, and every man creates, so to speak, his own world. Variations of physical temperament are innumerable, variations of intellectual and moral temperament no less so. Inequality is everywhere and civilization is only the increase of this inequality. The growing multiplicity of individual needs implies a growing diversity among individuals. All, assuredly, have one common aspiration, the lessening of individual suffering; but each one perceives different ways of attaining this single end of all human effort, and in consequence has different needs, which vary with different classes of society and also with the individuals in each class. The differentiation of capabilities is concordant and corollary. The fact is certain; it may be explained physiologically and psychologically. Physiologically, the need creates the organ, that is, special capabilities come into being to serve the needs, and if the needs differ, so will the capabilities differ. Psychologically, each

[20] "Division du Travail Social," p. 190.

internal aspiration tends to externalization and to become action; if internal aspirations differ, the activities by which they are openly manifested will differ. Thus the differentiation of individual capabilities and activities accompanies and keeps pace with the differentiation of individual needs. To sum up, civilization is, at bottom, nothing more than a greater differentiation among men who, with more desires and more activities, show greater differences in their desires and activities. Increase of needs and of activities, everywhere diversity of needs and activities, are all, at bottom, only an increase of human individuality. Each one is more individual because he is more himself and feels a greater difference from others.

3: BUT THE IDEA OF EQUALITY IS A PRODUCT OF CIVILIZATION. Nevertheless, the progress of civilization certainly concords with the birth and development of egalitarian ideas. Only at a very advanced stage of civilization was the equality of men affirmed and were certain social consequences attached to it. It is particularly in our century that the idea of equality has entered the minds of men, and nevertheless men have never at any period of history been so different. We believe that this is not self-contradictory. Without going to the bottom of the question, it is enough to note that the idea of equality might be a distinct social fact, explained by reasons of its own, and an indirect consequence of and a reaction from the increasing differentiation of men. The necessity of proclaiming the equality of men was not felt until the differences between them were appreciated. There is no question of the equality of men in a society composed of sensibly homogeneous elements, because such people feel that their needs are equal; equality of needs is the essential if not the only factor which unites them, and the idea of equality cannot be disengaged from the more comprehensive and simpler idea of solidarity

through similitudes. The concept of equality does not become autonomous until differences between individuals appear and are taken into consideration; men then understand better that in spite of these differences they have a community of aspiration, and especially that all are equal in the fact of suffering, and in a common desire to avoid it, or to lessen the frequency of its occurrence. The idea of equality then is separated from that of solidarity by similarity and gets exterior expression. This is not, however, the true explanation of this phenomenon. The progress of individual differentiations and of egalitarian ideas is parallel. This is necessarily so, for the two are manifestations of the same fact — the increase of individuality. To proclaim the equality of men is not to proclaim that all are exactly the same, but that each has individually a worth which is equally to be respected in human relations. To a superficial mind, the equality of men signifies that they are all exactly the same; to those who go to the bottom of things and scrutinize the profound causes by which this idea has been brought into existence, the equality of men is the recognition of an equal protection for the worth of each man. Men differ in worth, differ in individuality, nevertheless they are equal in worth, not in degree or in quality, but by nature, because for each worth is individual. And when the notion of solidarity through division of labor has definitely penetrated men's minds, the idea of equality is strengthened the more, for, with the realization that the more men differ one from another the greater becomes their mutual usefulness, comes a better understanding of the fact that individual activities, though different, are nevertheless socially equal, since they all contribute to social solidarity.

But do not let us anticipate. Let us merely add that the proof that the idea of equality results directly from

the increase in individuality, lies in the fact that all of the philosophical and religious systems which were based on individualism ended in a very clear affirmation of the equality of men. This is just as true of Stoicism and of Christianity as of the philosophy of the 1700s and of the doctrines associated with Proudhon.[21]

4: THIS FORM OF SOLIDARITY STRONGER THAN SOLIDARITY BY SIMILITUDE. The increasing differentiation between men is then an undeniable fact, and is perfectly to be conciliated with ideas of equality. What have been the principal causes of this differentiation? To study them in detail would be to study the whole history of civilization. We shall indicate some of the elements in the following paragraph. One point is now settled — a constantly increasing diversity in capabilities and in needs. This fact becomes, in the human consciousness and will, the thought that through the exchange of the services which each is best fitted to render men will be able to diminish human suffering, that by developing their individual activity they will have more to exchange, will consequently diminish further the sum of their unhappiness; and it comes to this — the will to develop such activity and to exchange such services by the consciousness of a new form of solidarity which we term with Durkheim *solidarity through division of labor*. This bond of union among men is not a community of thoughts and wants, it is on the contrary a difference of thoughts and wants, a difference of desires and needs; men think of themselves as bound together because they all have different capabilities and different needs, and because by an exchange of services they can assure the satisfaction of their different needs.

[21] See *Bouglé*, "Les Idées Égalitaires" (1899), who, however, does not in our opinion insist sufficiently on this idea. *Faguet*, "Politiques et Moralistes du XIX siècle," third series, pp. 119ff. (1900).

This form of solidarity is infinitely stronger than solidarity by similitude, but springing from the same root, the development of individual consciousness. The social bond is drawn closer, for *socialization* increases with the division of labor; but the development of individual activity — the creation of *vocations* — is an essential factor. Without individual vocations there is no division of labor. This kind of solidarity is the condition of a strong social structure, but it is itself conditioned by the intensive increase of individuality. Socialization increases in direct proportion to division of labor, but division of labor itself increases in direct proportion to *individualization*, so that socialization and individualization not only are not mutually exclusive, but one goes with the other. There is no opposition between individual and collective interests, and the suggestion that there is comes from a superficial view of solidarity. For many solidarity means simply recognition of the collective interest, and those who preach solidarity preach the sacrifice of individual to collective interests. Have not socialistic doctrines been sometimes defined as those which tend to bring about a predominance of altruism over egoism, or collective over individual objects? This is all false. Those who can see under the surface of things, who understand that the essential factor in modern social combination is division of labor, the exchange of services, and that division of labor is impossible without a wide and free development of individual activity, are convinced that the essential factor of socialization is the development of individual activity.[22] The consequences which we shall have later to draw from this idea, when we are determining the power and duties of the State, are already evident. To use consecrated expressions, we shall be very individualistic and very

[22] See the article by *Jaurès* in *Revue de Paris*, Dec. 1, 1898, p. 481.

socialistic,— very individualistic in refusing to the State the power to impede the free development of individual activities, and in imposing on it the duty of protecting such activities, but very socialistic in recognizing in the State widely extended powers of intervention and in imposing on it very rigorous duties. In any case, one point seems to us certain, and it is capital; the degree of social integration depends on the degree of individualization; there is no collective interest in opposition to individual interest, and collective interest is merely the sum of individual interests; in other words, the collective interest will be safeguarded by the protection of all individual interests, and better safeguarded the better they are protected.

5: THIS SOLIDARITY DUE TO THE DESIRE TO LESSEN SUFFERING. How are the consciousness and the practice of solidarity through division of labor brought about? By the desire to lessen individual suffering. We do not say that the cause of the division of social labor is the quest for happiness, and we thus escape Durkheim's objections to hedonism. [23] That author makes the just observation that if the quest for happiness was the only cause of the division of social labor, that division would have stopped, because happiness, if it exist, can only consist in one thing, the golden mean. However well men think that they know in what happiness consists, they really do not know at all, and they cannot work to attain the happiness which they do not know. Besides, it is very doubtful if happiness does increase with progress, with division of labor; the increase of suicide with the progress of civilization would seem to indicate the contrary. All this is very accurate, but it does not prove that the only spring of human activity is not the search for the least evil. It is true that man cannot

[23] "Division du Travail Social," pp. 255ff.

have a clear idea what happiness in itself is. But man suffers, wishes to suffer less, and wants all that he believes, rightly or wrongly, should diminish his suffering. It is difficult, impossible even, to know whether the sum total of suffering in a society which has attained a certain degree of civilization is less than that existing in a society less highly civilized. Even should it be greater our proposition would be unshaken, for men suffer, they have different needs, they understand that they have different aptitudes; and if they understand at the same time that they can satisfy their needs by exchanging services, if they desire and practise exchange of services, it is because and only because they believe, or if the term be preferred, hope, that division of labor will result in a diminution of suffering. If division of labor grows continually more pronounced, the reason is that there is an ever increasing diversity of needs and desires; there is always some suffering in the world, and this yearning for the least evil is never satisfied. We can discuss happiness as much as we please, the fact of suffering is ever present. Suffering may be called fruitful and meritorious, and elevated religious and ethical doctrines may be founded on it. But in fact man has desired and always will desire to suffer less, and this is for us the single factor in his thoughts and in his acts.

6: Other Influences on Division of Labor. At the same time we freely admit, with Durkheim, that certain variations of social environment have also influenced division of labor. The general and unconscious cause which has favored the development of division of social labor is the progressive condensation of societies, a condensation which has been brought about in three ways during the course of history: (1) Population has been steadily concentrating on smaller territory, (2) cities have grown and a general tendency is mani-

fested among country people to go to cities, and finally (3) the number and rapidity of means of communication have very considerably increased. In short, division of labor will vary in direct proportion to the volume and to the density of societies. It will also have organic-pyschic causes. Heredity retards it, because heredity obstructs individual change and initiative; but for various reasons heredity as an obstacle is becoming less important. Heredity is losing its empire in the course of evolution because of the formation of certain factors of activity which have nothing to do with it; on one side the great human races remain stationary, and on another it seems to be established that there is no transmission of special aptitudes.[24]

However this may be, these things are certain: that men have different aptitudes and different needs; that these differences increase steadily with the progress of civilization, or rather are civilization itself; that men are conscious of their unity, because they know that they can satisfy their needs only by an exchange of services; and that this solidarity grows closer the more pronounced are the differences in individual aptitudes, for then exchanges are more frequent and more productive. Consequently the social bond grows the stronger as men are more sharply individualized. Thus division of labor is at once an element of solidarity and of individualization. It was at first spontaneous; later men became conscious of it, and wanted it, as they should want it. We shall see later that solidarity through division of labor constitutes, with solidarity by similitude, the foundation of the rule of law.[25]

[24] *Durkheim*, "Division du Travail Social," pp. 338ff.

[25] ["Règle de droit."]

CHAPTER X*

THE RULE OF LAW

SUMMARY OF PRECEDING ANALYSIS — THE PROBLEM OF A RULE OF CONDUCT

CONSCIOUSNESS OF SOCIAL SOLIDARITY IMPLIES CONSCIOUSNESS OF A RULE OF CONDUCT: (1) THE RULE MUST BE A LAW OF PURPOSE; (2) THE FIRST RULE OF CONDUCT; (3) A RULE PRACTICALLY UNIVERSAL; (4) THE SECOND RULE OF CONDUCT; (5) THE THIRD RULE OF CONDUCT; (6) WHY LEGAL PRESCRIPTIONS HAVE GROWN IN NUMBER; (7) CONCLUSION, THE COMPLETE RULE OF CONDUCT

GENERAL CHARACTERISTICS OF THE RULE OF CONDUCT: (1) A RULE BASED ON THE FACT OF SOCIETY; (2) BECAUSE INDIVIDUAL, THE RULE IS DIVERSIFIED IN ITS APPLICATION; (3) THE RULE OF CONDUCT APPLIES TO STRONG AND WEAK ALIKE; (4) THE RULE IS PERMANENT IN CONTENT, CHANGING IN FORM; (5) THE RULE OF CONDUCT IDENTIFIED WITH SOLIDARITY

THE RULE OF CONDUCT IS THE RULE OF LAW; IT IS OBJECTIVE LAW: (1) THE DISTINCTION BETWEEN LAW AND MORALS; (2) SOLIDARITY NEITHER EGOISTIC NOR ALTRUISTIC; (3) THE RULE IS ONE OF LAW, RATHER THAN OF MORALS, BECAUSE IT HAS ITS BASIS IN SOCIAL RATHER THAN INTRINSIC VALUES OF CONDUCT

THE DOCTRINE OF JHERING AND JELLINEK AND ITS REFUTATION: (1) UNSOUND GERMAN THEORIES OF LAW; (2) JHERING'S DOCTRINE SUMMARIZED; (3) HOW JHERING SUBJECTS THE STATE TO ITS OWN LAW; (4) JELLI-

*[This chapter = chapter ii of the original work. — Ed.]

NEK SAYS THAT THE STATE LIMITS ITS OWN ACTION BY THE LAW THAT IT CREATES; (5) LABAND SUPPORTS THE SAME DOCTRINE; (6) THE ERROR OF THESE THEORIES IN LAYING TOO GREAT STRESS ON ORGANIZED SANCTION; (7) THE RULE HAS THE SANCTION OF PSYCHOLOGICAL COERCION; (8) THE RULE OF LAW IS ANTECEDENT TO THE IDEA OF THE STATE; (9) MANY RULES ADOPTED BY THE STATE HAVE ONLY A PSYCHOLOGICAL SANCTION; (10) FINALLY OUR THEORY PERMITS LIMITATION OF THE POWERS OF THE STATE; (11) THE GERMAN DOCTRINE WHICH DENIES THAT CONSTITUTIONS ARE LAWS; (12) JELLINEK'S VIEWS IN HIS "ALLGEMEINE STAATSLEHRE"; (13) POINTS OF JELLINEK'S DOCTRINE HERE ACCEPTED; (14) JELLINEK, HOWEVER, REGARDS THE LAW AS WILLED BY THE STATE; (15) THE ERROR OF TREATING THE LAW AS CREATED EXCLUSIVELY BY THE STATE; (16) JELLINEK'S EXPLANATION OF SELF-LIMITATION BY HISTORICAL EVOLUTION; (17) THE DILEMMA OF JELLINEK'S THEORY

THE DOCTRINE OF GIERKE AND PREUSS: (1) THE THEORY OF GIERKE; (2) THE NEED FOR EXTERIOR LIMITATION OF MEN'S WILLS, *i.e.* LAW; (3) LAW AND THE STATE PROCEED TOGETHER; (4) THE STATE IS A LEGAL PERSON; (5) INDIVIDUALISTIC DOCTRINARISM IN GIERKE; (6) THE PRIMARY CONCEPTION OF THE RULE OF LAW.

§ 186. *Summary of Preceding Analysis.* From the preceding analysis we may conclude that in all forms of human communities there is just one reality, the human being, that is to say, the consciousness and will of the individual; and this individuality appears to us as the more alive and the more active, the more coherent, complex, and comprehensive is the social group. Men live in society, and want to live in society, (1) because

they are conscious of common needs which they can satisfy only by community life (solidarity through similitudes), and (2) because they are conscious of different aptitudes and needs, and can only assure the satisfaction of these needs by an exchange of the services for which each has a special aptitude (solidarity through division of labor). Man is conscious of his individuality and of the double solidarity which unites him to his fellows; he is both social and individual. His individuality and his sociability are not in opposition, they are combined in a close and indivisible union, they are in a way functions one of the other. Individuality grows in proportion to the growth of sociability, sociability develops with individuality. The opposition between the individual and the collective, so often brought forward, does not conform to the real nature of things. In fact, both fuse into a single whole, and this whole is man himself.

§ 187. *The Problem of a Rule of Conduct.* Can a rule of conduct be drawn from this statement of fact, and what is this rule of conduct? Does man know it? Has it a sanction, and if so, what sanction? These are the problems which present themselves to every social science for solution. If they cannot be solved, social science is vain; if, on the contrary, it is able to settle these points, it has solved all of its other problems as well. Both economic and legal problems come back to the question of a rule of conduct which man must obey; all are problems of morals,[1] if by morals one understands rules of conduct, truly human, without a metaphysical or a priori foundation. This law [loi] of human wills and actions we call a rule of conduct, because it applies to conscious acts. It cannot be a law of causality, like the laws of the physical world; it can only be a law of

[1] *Ziegler*, "La Question Sociale est une Question Morale" (1898).

finality of purpose.[2] We do not learn it from the regular reproduction of causes and effects, but from man's consciousness of it when he acts. It does not appear as a relation, but as an imperative. This imperative character does not imply that man is free in the sense of Spiritualist philosophy; it supposes only what is undeniable, that man selects consciously the motives which determine his acts, or which he believes determine them. Because they misunderstood this, and tried to carry over into the world of society the mechanism of the physical world, the first systems of sociology died out. It is not enough, as was claimed by their authors, to found a system of morals by determining the evolution of the moral conceptions of humanity. That is only to avoid the problem, which must be solved by determining what rule of conduct in a given epoch binds the conscious activity of man, an attempt in which the young French school of philosophy and sociology is remarkably exerting itself. We do not intend to study the problem on all sides, but only to show that the notion of social solidarity implies the conception of a rule of conduct, sufficient to determine the powers and the duties of social man in general and of the man invested with political authority in particular.[3]

[2] See § 179 ante. On the character of the social *norm* and its difference from laws of causality, cf. *Wundt*, "Ethik," pp. 2ff., 462ff. [the English translation, "Ethics," 3 v., London, 1897, retains the pagination of the German edition]; *Jellinek*, "Die social-ethische Bedeutung von Recht, Unrecht, und Strafe," pp. 19ff., and "Allgemeine Staatslehre," pp. 17ff., 123 (1900); *Jhering*, "Law as a Means to an End" [translated in this Series], pp. 2ff.

[3] See notably *Durkheim*, "Division du Travail Social." Although a sociologist, the author has well understood the capital importance of the ethical problem. Cf. *Rauh*, "Essai sur le Fondement Métaphysique de la Morale," especially p. 194 (1890); *Fouillée*, "Critique des Systèmes de Morale," especially Preface and Conclusion (1893); *Guyau*, "Esquisse d'une Morale sans Obligation ni Sanction," especially pp. 75ff.; *Blondel*, "L'Action" (1893). To our mind, these authors make the mistake of giving too much weight to metaphysical speculations.

§ 188. *Consciousness of Social Solidarity Implies Consciousness of a Rule of Conduct.* 1: THE RULE MUST BE A LAW OF PURPOSE. The law whose formula we seek cannot be, as we have remarked, a law of causality, but is a law of purpose (finality), because it is the law of the conscious actions of man, and because he acts only in view of an end which he chooses more or less consciously, if not freely. This end is in our opinion only the immediate end which determines action. It is not a general, transcendent finality, but an immanent and special finality. We have not to found some sort of teleological system, but to determine directly the value of each human act. Now this act can be valued only with reference to the end determining it, for in itself the act is nothing. It is only an external emanation of individual will; it can then be estimated only in terms of the will whence it comes, and this will acts only when determined by an end. It all comes back then to the value of that end, which exists only as it is conceived by the doer of the act. The problem thus becomes: When is the end which the doer of the act thinks determined him to act, of such a nature as to give a certain value to his act? If, however, the question be supposed as answered, if it be admitted that the end which determined a certain conscious act gave it a value, it is left to be decided just what that value is. Let us explain this further.

2: THE FIRST RULE OF CONDUCT. Imagine, by hypothesis, a society in a state of absolute rest. So long as no one takes any action, the problem of the rule of conduct does not arise, for the rule of conduct implies wills entering into relations, and if no will shows itself externally there is no occasion for applying a rule of conduct. Theoretically such a conception is possible, though the situation cannot actually arise. The rule of

conduct, if there is one, appears only when, in the case of a will expressing itself in an external act, the value of this act must be estimated. Then the value of the act can consist only in this: the obligation of all to do nothing contrary to the realization of this individual will, and the obligation of every person to do what he can to assure its realization. We then say that the act has social value. But when will an act of individual will have this social value? Obviously, when it is determined by an end corresponding to social solidarity — solidarity through similitudes or solidarity through division of labor. An act of individual will, determined by such an end, imposes itself upon everybody. That is, indeed, a necessary and logical consequence of solidarity. Man is man only by virtue of solidarity, which unites him to like men; only through this solidarity can he succeed in diminishing the sum total of human suffering. Consequently every act of individual will which tends to realize this solidarity should forcibly possess itself of every man's respect. To put the matter as simply as possible, if one supposes a society in a state of absolute rest, indeed there is no rule of conduct; the notion of a rule of conduct exists only from the moment when a will showing itself externally faces the task of ascertaining whether this will may impose itself on others — and it will so impose itself if the will is determined by an end adequate to social solidarity. Whence comes this first rule of conduct, common to all men: *Respect every act of individual will determined by an end of social solidarity. Do nothing to prevent its accomplishment. Coöperate as far as possible towards its accomplishment.*

3: A Rule Practically Universal. This notion of a first rule of conduct must have come very early into the human mind, if it was not always there. More or

less indistinctly, man has always thought of himself as at once individual and social. He has always lived with other men and thus has always been conscious of his solidarity with them, though this consciousness was, for a long time, very obscure. From the moment when man had this idea he had the feeling of being subject to this solidarity; from the moment in which he realized that solely through community life could he exist and diminish his suffering, he understood that he was himself subjected to every act of another calculated to maintain or strengthen this solidarity. Consciousness of this rule of conduct consequently blended with consciousness of social solidarity. So there are certainly no human societies, however primitive, without the consciousness more or less clear that men are subject to certain rules of conduct. These rules may be very narrow, the peculiarity of their provisions may astonish us, men may be only vaguely conscious of them, and they may be continually violated by triumphant force; nevertheless not a single human community will be found without this notion of a rule of conduct, imposed upon man because of the fact that men live together. This every ethnographic and sociological study shows. Of course the idea of this first rule of conduct, becoming confused with the sentiment of social solidarity, will naturally follow the same evolution as this solidarity and undergo corresponding transformations. Notably in the forms of society in which solidarity through division of labor becomes preponderant, this rule will impose respect for every act of will furthering the free development of individual activity. Individual activity being, in truth, the essential factor of solidarity through division of labor, every act tending to widen the scope of individual activity will be determined by an end of solidarity, if it does not at the same time restrict the special activity

of other individuals, and this act will possess itself of the respect of all. It seems to be a purely individual act, but it is not so at bottom, since it is determined by an end of solidarity; and by virtue of that fact it is imposed upon everybody.[4] Variations matter little, this fact always remains: with the consciousness of the solidarity which unites him to his fellows and without which life would be impossible, there comes to man the idea of a rule imposing respect for every act of an individual will determined by an end of social solidarity, whatever be the form which social solidarity may have assumed in this or that society.

4: THE SECOND RULE OF CONDUCT. Such, in the history of the human mind, was the first notion of a rule of conduct. This notion contained in itself the germs of all of the subsequent developments which it was to receive in the natural progress of individual consciousness. If every act of the will of an individual determined by an end of social solidarity receives the respect of all other individuals, it is evident that every act of will which does not fulfill this condition lacks such respect. If every individual has socially the power to perform an act inspired by an end of social solidarity, no individual has power to perform an act inspired by a different end. If every individual is under a duty to respect an act adequate to social solidarity, no one is under a duty to respect an act disagreeing with it. Developing this idea, one may even conceive that every individual is empowered to protect the social solidarity from acts attacking it, or to repair any injury done it by such acts; and consequently there will be developed the sentiment of a duty of the individual not to do such acts. The notion of a second rule of conduct is then logically developed from the first: *Every individual ought to abstain*

[4] See § 189 post.

from any act that would be determined by an end contrary to social solidarity. This rule is at bottom the same as the preceding one, and like it is contained in the consciousness of social solidarity, and will mirror exactly the different aspects of that solidarity in accordance with conditions of time and place. The range of this prohibitive rule will vary with the range and complexity of the solidarity which unites the members of this or that society, but it will remain at bottom always the same. For it was born with the consciousness of social solidarity, that is, ever since men have existed; it will continue as long as men exist, infinitely variable in its application, but immutable in its original principle.

It is, then, apparent that the consciousness of social solidarity implies the notion of a double rule of conduct — the obligation on each individual to respect every act of an individual will done with a purpose of social solidarity, and an obligation on each individual to do nothing with a purpose not in conformity with social solidarity — and we may affirm that, in every stage of civilization, man has had the conception of this double rule. He has conceived and applied it in greatly varying forms. Even in societies which have attained a practically identical stage of civilization, these applications may differ profoundly; but the abstract idea of this double rule is always the same, being nothing more than the idea of social solidarity in its two forms.

5: The Third Rule of Conduct. Has man gone further? Has he acquired the sentiments of a third rule of conduct? Up to the present, we have supposed an act of will as accomplished, and have said: In one case man's duty is to respect it, in another, he has the power of repressing it. It follows then that his duty is not to do an act which others have the power to repress. Man assuredly is empowered to do an act which others

are bound to respect, that is, an act determined by an end adequate to social solidarity. Is there here, however, merely a question of power; is it not his duty to do such acts? Has man grasped the idea of a wider rule of conduct, the idea that each individual is not only charged with the duty of respecting acts of solidarity done by others, but also of actively doing all he can to develop social solidarity in its two forms? Man assuredly did not acquire this extended idea of social duty immediately. It is, nevertheless, the normal consequence of the primary idea previously indicated, and in fact this obligation is the necessary complement of the idea of social duty. If man is obliged to respect any act done with a purpose of solidarity, if he is obliged to do nothing except with such a purpose, it is evidently because he is obliged to act in conformity to social solidarity. This double obligation is therefore at bottom only the application of a wider rule: *Coöperate in the realization of social solidarity.* The development of human consciousness must logically lead to this conception. The content of individual thought develops from the simple to the complex, or in other words, the content of human thought has grown in the course of ages by successive additions, completing and enlarging its primal conceptions. We have followed the definition, the extension, and the complication of the sentiment of social solidarity, and in the same way the idea of the rule of conduct which that solidarity imposes widens, becomes defined and complicated. From the time when man was profoundly convinced that he was both individual and social, that he could not live without others and that others could not live without him, he perceived his obligation to coöperate in social solidarity, he understood that it was not enough to respect social, to refrain from unsocial, acts, but that he was under a positive

obligation to do of his own accord everything that he could which might profit social solidarity. The rule of conduct then appeared to him in all its generality and simplicity, coöperation in the realization of social solidarity under its two forms.

6: Why Legal Prescriptions Have Grown in Number. This extension of the rule of conduct as conceived by man is incontestable, and to prove it stress is rightly laid on the advancing increase in the number of legal rules.[5] The reason why the number of legal prescriptions has increased with civilization, why in our day especially their mass swells in considerable proportion, is because modern man understands more clearly his duty of coöperation. Belated representatives of the orthodox school of political economy see in this a regrettable tendency which men at the head of affairs should make every effort to stop. We see in it, on the contrary, a normal and inevitable phenomenon, the necessary consequence of the conception, every day becoming clearer, of the rigorous obligations resting on all the members of a society. We shall not press this point here, but will return to it when we show that this rule of conduct, which puts on men the obligation of coöperation in the realization of social solidarity under its two forms, is precisely the rule of law itself, and when we study the powers and duties of the State.[6] We add here only that the evolution is not yet perfected, that the endless controversies over the juridical character of this or that rule, and especially over the rôle of the State, indicate a transformation now in progress. But from day to day, as the consciousness of social solidarity becomes clearer, there is a simultaneous increase in

[5] Notably in the case of *Durkheim*, "Division du Travail Social, p. 427.

[6] See § 190 post. [See also, in the French text, chap. iv, §§ 3–6, here omitted.— Transl.]

the juridical obligations that seem to rest upon the State and the individual.

7: CONCLUSION. THE COMPLETE RULE OF CONDUCT. To sum up, the idea of a rule of conduct is essentially bound up with and dependent upon social solidarity; one does not go without the other — they are really one and the same thing. Their evolution has been parallel. The closer and more complex the bonds which unite a man to his fellows appear to him, the more rigorous and wider seems the idea of social duty. Man is solidary with other men; he desires solidarity because he cannot be other than solidary, and for that very reason he ought to desire solidarity. We do not have to consider whether this rule of conduct is objectively real; that is properly a question of metaphysics. In any case the rule of conduct interests social science only so far as it appears in the human mind. It is a social fact, and like all social facts it exists for us only by reason of the individual consciousness of it: thus only can we know it.

Finally, from the fact that he is solidary with other men, man derives a rule of conduct which may be summed up as follows: *Do nothing to diminish social solidarity by similitude, or social solidarity through division of labor. Do everything materially practicable for the individual to increase social solidarity in both its forms.*

§ 189. *General Characteristics of the Rule of Conduct.* 1: A RULE BASED ON THE FACT OF SOCIETY. This rule of conduct, born of social solidarity, may be said to be modeled on this solidarity; it appears with the same characteristics. Like solidarity, it includes the whole man; like solidarity, again, it is at the same time individual and social.

The foundation of the rule of conduct is social in that it exists because men live in society, otherwise there

would be no such rule. Man, however, can only live, and always has lived, in society, so that this rule of conduct has always existed, and always will exist. It is in evidence as soon as there comes into being a combination of men and because of that combination. It is found in all human combinations, in the most primitive equally with the most civilized, in the humblest as well as the most powerful, in the simplest just as in the most complex; it sways amorphous and organized societies, societies seemingly lacking even the embryo of a political organization, as well as societies with highly developed, complicated political systems. From this point of view we are in accord with the pure sociological doctrines which look upon morals and law as spontaneous growths, as natural products of social development. We refuse to approve of any assimilation with biology, but we unhesitatingly admit that law and morals result naturally from social relations; we oppose all doctrines which base law and morals on the existence of individual rights and duties anterior to any society — rights and duties belonging to and resting upon man because he is man. The rule of conduct is a social product, or better, it is society itself, in the sense that the existence of society implies the existence of a rule of conduct.

At the same time, however, the rule of conduct is individual, first because it is and can only be the concept of an individual. Here we part company with the generally admitted doctrines of sociology. The assumed social consciousness seems to us pure hypothesis, as we believe we proved in the last chapter, by showing that the idea of social solidarity is exclusively individual, that the development of social solidarity has always coincided with an extension of the individual consciousness, that the idea of social relations is individual,

that the content of a consciousness may be social but the consciousness itself is always that of an individual. The idea of solidarity contains the idea of the rule of conduct; the two ideas properly are one, therefore the idea of the rule of conduct is exclusively individual. Let us put aside all artificial hypotheses of social consciousness; individuals, members of the same social organization, think and want the same things, but they think and want them as individuals. The rule of conduct is imagined and willed by the individual and solely by the individual. The national consciousness of the German historical school[7] is a fiction, like the social consciousness of sociologists. The individual man imagines and wills the rule of conduct as he imagines and wills social solidarity, and only in the consciousness of the individual can we see either the rule of conduct or social solidarity.

In the second place the rule of conduct is individual because it applies only to individuals. A rule of conduct can only bind creatures endowed with consciousness and will, that is creatures able to comprehend, however obscurely, the motives of their actions. It is of little significance that the creature who acts deceives himself as to his real motives. We are not interested in what end really impelled him to act, but in what end he thought gave the impulse. Things happen just as if the end in the individual's mind really caused the action. Nor do we say that the rule of conduct can only apply to free beings. Liberty in the metaphysical sense is undemonstrable. Individual will, on the contrary, is perfectly comprehensible. It matters little whether it be free or foreordained; where there is conscious action,

[7] See notably *Savigny*, "Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft," 1st ed. 1814, and "System des Römischen Rechts," vol. i, §§ 7ff.; *Puchta*, "Das Gewohnheitrecht," vol. i (1826), ii (1837); cf. *Gény*, "Méthode d'Interprétation du Droit Privé," p. 276 (1899).

there is will. Will is nothing more than the internal conscious force which brings about an external act, a force set in motion by a particular end seized upon by the person entitled to this force. Consciousness and will are enough to make possible the application of a rule of conduct, and they are essential. Without them there can be a law of causality, but no law of purpose. Every rule of conduct is a law of purpose, and it has not yet been scientifically demonstrated that there are beings other than men who are capable of voluntary, conscious actions. Until this has been proved we must limit the application of rules of conduct to the individual man, and to him alone. A rule of conduct cannot apply to a collectivity, because there is no proof that any group has consciousness and will. The objection will no doubt be made that then there can be no foundation for the rights and obligations of the State, and of the different groups which grow up about modern man. This objection falls into a vicious circle because it must first of all be proved that the true conception of law and legal obligation requires the recognition of the personality of communities. We repeat that our rule of conduct can only be applied to individuals, and, a point which will later be taken up, that if it implies rights and obligations, these rights and obligations can only be those of individuals. As Léon Bourgeois justly observes: "The point is not to define the rights which society may have as against individuals, but the reciprocal rights and duties which the fact of association puts upon men, the only real beings, the only possible subjects of rights or of duties." [8] Let us have done with the discussion of the rights and obligations of the individual, of society, of the State, and with the opposition of the individual and society. Society exists only through the individual,

[8] *Bourgeois*, "Solidarité," p. 90 (1896).

there is nothing but individuals living in society, there are no rights and obligations other than those of individuals living in society.[9] Socialism and individualism, in their current meanings, have no value; every socialistic tendency is properly individualistic, every sane individualistic tendency is at the same time socialistic.

2: BECAUSE INDIVIDUAL THE RULE IS DIVERSIFIED IN ITS APPLICATION. Individual because it is conceived by individual consciousness and because it applies only and can apply only to individuals, the rule of conduct is, by that very circumstance, diversified. It is diversified because men are different, have special aptitudes, get into varying situations, and should therefore be subjected to rules of conduct at once the same and different. The rule of conduct is the same for all men because it requires coöperation in social solidarity, an obligation common to all. Different men, however, have different capabilities, which should be put to the service of the social whole. Hence the rule of conduct requires of all men individual efforts corresponding to individual capabilities. This diversity of the rule will increase in direct proportion to the increase in the differentiation among men. The greater the difference between men, the greater the difference between their obligations arising from the rule of conduct. Particularly in our modern societies, characterized by a profound diversity in individual talents, the obligations which rest upon individuals are infinitely varied. The principle of the obligation is the same for all; its application differs with each one. Coöperation through the division of labor, an essential element in modern social solidarity, is

[9] *Jellinek* ("Allgemeine Staatslehre," pp. 121ff., 1900) is forced to admit that the personality of collective organizations is a pure legal concept, not responding to any objective reality, "a form of synthesis necessary for our consciousness," but that "always men are necessarily the substratum of the corporation."

the employment of special capabilities in that exchange of services whence results such solidarity. The rule does not require each one to do an equal share in the divided tasks, but to do a share corresponding to his special capabilities. This shows the falsity of the conception that men are mathematically equal. They are equal because they are all under the general obligation to coöperate in social solidarity, but the consequences of this common obligation vary with each person, because no one can so coöperate except under conditions peculiar to him alone.

True equality means equal treatment for that which is equal and unequal treatment for that which is unequal. It would be treating inequalities equally if the same obligations were imposed on all, and that would not be equality.[10]

3: The Rule of Conduct Applies to Strong and Weak Alike. The rule of conduct is individual and diversified, but it is also general. Social solidarity includes all the individuals in the same collective group without exception. The rule of conduct, consequently, is imposed upon all individuals without exception. It does not rest upon the collective group, a fictitious being, but without distinction upon all individuals united by the bond of solidarity, proportionately to their capacity to act. It requires more of some, less of others, but something from each one, because it is social solidarity itself, and all are bound by the tie of solidarity. From this we deduce an important consequence. If there are in a social group certain individuals stronger than the rest, either because a higher moral or religious force is attributed to them or because they exert a material power of coercion, or because they are actually supported by the consent of a majority, such individuals

[10] *Paul Lafitte*, "Le Paradoxe de l'Égalité" (1887).

are subject to the prescriptions of the rule of conduct just like the others and just as rigorously. In such societies, a political authority is said to exist. Such societies are termed States, if this greater force of certain individuals presents a certain character of permanence and of organization. The rule of conduct, nevertheless, has the same sway over the powerful, over the rulers, as over the weak, the ruled. It requires of them the same forbearance, to do nothing which may injure social solidarity. It prescribes the same duties, to do everything in their power to increase social solidarity. These obligations go further even for the strong, for the rulers, than for the ruled, but not because the obligations are of a different order or are founded on a different principle. They are identical in nature and basis, they differ in number and range. The rulers, as they are stronger than the others, can work more effectively toward the realization of social solidarity; by using the force which they control they can prevent injury to social solidarity. They should make use of the greater power with which they are intrusted for the ends of social solidarity, and their power is legitimate when so employed. Thus appears the principle of the positive and negative limitation of the State.[11] We will restrict ourselves at present to the statement that this general obligation puts on rulers a special obligation, that of assuring, by the employment of force, the attainment of a result sought by an individual will, every time that this individual will has been determined by an end in conformity with the rule of conduct. And, if, as we shall endeavor later to show, this rule of conduct is the rule of law — objective law — it will be understood how, in our opinion, both the negative and positive powers

[11] [The author here refers the reader to chapter iv, not here translated. — TRANSL.]

and duties of political authority are determined by this objective law. We do not say with Jhering that law is "the policy of force,"[12] but that the law imposes on those holding power a policy of force, that is, an obligation to put their power at the service of the rule of law.

4: The Rule is Permanent in Content, Changing in Form. Finally, this rule of conduct is both permanent and changing. Its base, which is society itself, is permanent; it remains the same in its general content. Every society is a solidarity, every rule of conduct for men living in society commands cöoperation in this solidarity, all social relations have always been and always will be relations of similarity or of division of labor, hence the rule of conduct and its general content are permanent. At the same time, the form which these two kinds of solidarity assume and have assumed vary, have varied, and will vary infinitely. Human societies are shown in history in the most diversified aspects, and these aspects will change again indefinitely. Hordes, clans, segmentary societies based on clans, families, cities, nations, are so many different social forms, and the future is certain to witness the rise of others which it is impossible to foresee. There is no ideal social type towards which man is bound constantly to work. The rule of conduct, as we understand it, is no absolute principle which every human effort should continually tend to realize. No one knows, no one can know, this social ideal; it would be the social absolute, which perhaps exists, but which no one knows or will ever know. When we speak of progress, we do not mean that such or such a society is nearer such an ideal but simply that it is more highly differentiated, more solidary, and that its members believe that they suffer less than before. The content

[12] See p. 245 ante.

of the objective rule is a factual content constantly in course of transformation and varying with time and country. Here solidarity through similitudes dominates, there solidarity through division of labor. These social elements themselves vary under the influence of the most diverse factors, with the character of different collective groups, nomadic, pastoral, agricultural, military, industrial. The rôle of the historian and of the sociologist is evidently to determine the successive phases of this evolution; to state the content of the rule of conduct in a given period by observation of the social facts of that period, and not to compare the different social forms with a postulated social ideal. Thus, while we admit the existence of a rule of conduct with a permanent base, we do not agree with the doctrines of natural law according to which this rule of conduct is absolute and unchangeable, sometimes misunderstood and obscured, but always in existence as a social ideal towards which all human societies should strive, and as a standard to measure the level of their civilization. At the same time we believe that we escape our own criticism of contemporary sociology, that it cannot establish a fixed principle for human conduct. Our principle is undoubtedly positive, no other could be scientifically formulated; but it will endure unmodified as long as men exist, for it is drawn from man himself, in his double nature which is both social and individual.

5: THE RULE OF CONDUCT IDENTIFIED WITH SOLIDARITY. There exists then, a rule of conduct, based on social solidarity, of which man becomes conscious at the time when he becomes conscious of his solidarity with other men. The two ideas are really one, their evolution is identical. This rule is social in foundation, individual in application and in concept, diversified because it is individual; general because it is social, permanent in

principle, infinitely changing in application. Is this rule of conduct a rule of law?

§ 190. *The Rule of Conduct is the Rule of Law; it is Objective Law.* 1: THE DISTINCTION BETWEEN LAW AND MORALS. The rule of conduct, thus understood, is a rule of law and not a moral rule, though that question really seems to us quite uninteresting, and the endless controversies which for centuries have been waged over the boundary between morals and law seem vain. If there be found, through the observation of facts, a principle of conduct sufficiently general to be imposed on all, sufficiently fixed to apply in any society, sufficiently supple to bend to all the needs of a period, to all the requirements of a people, what matters it whether this principle be termed moral or legal? If, beginning with the single incontestable reality, the individual ego, it be established that the individual is subordinated to a rule which imposes forbearance and obligation towards others, what matters it whether that rule be one of morals or of law? What matter whether it be moral or legal, if all are subject to it, if it knows neither superior nor inferior, if it applies to all and no one has edicted it, if it is imposed on all and no one has created it? There is no logical difference between morals and law; there can only be a difference of fact in a never ending process of evolution. If all men were clearly and fully conscious of the two essential elements of social solidarity, similitudes and division of labor, if all men understood distinctly that their lives depend on their coöperation in this double solidarity, no one would think of a difference between law and morals; for all men the rule of morals would be merged into one of law. In the general evolution of humanity, there are, however, always certain men more enlightened than the rest, with a better, more precise idea of social solidarity, who consequently

understand as obligatory certain rules of conduct which the great mass does not so consider. These rules, not yet so well understood by all that their observance appears essential to social solidarity, are those which we call moral. The term "rules of law" is given to imperatives which seem to the mass of men essential conditions of the maintenance and development of solidarity. Both legal and moral rules are, however, of the same character, both are based on the same principle, the concept of both has the same content; it is only that the rules called moral are known less fully and by fewer individuals than those termed rules of law. This explains how it happens that with the progress of civilization the domain of morals daily loses ground to that of law. The rule of conduct, becoming a rule of law, does not change its character, it remains just what it was; it becomes a rule of law simply because it is understood more clearly by more individuals.

2: SOLIDARITY NEITHER EGOISTIC NOR ALTRUISTIC. Morality is not, as some sociologists teach, the reconciliation of the two contrary sentiments, altruism and egoism, which control man. Moral progress is not the triumph of altruism over egoism. The human mind exhibits no such duality. The idea which, through intellectual progress, penetrates deeper into the consciousness of men, is that of social solidarity, which is at once altruistic and egoistic, or more exactly is neither one nor the other. When man realizes that he is solidary he realizes that in violating the rule of conduct in regard to one person, he violates it in regard to all, including himself — that in coöperating in the work of solidarity he is working for all and for himself, and that every injustice done to another is an injustice affecting the whole of which he is a part. Imbued with these ideas, man is neither altruist nor egoist, he is himself, he is man. What

is called egoism is merely ignorance of, or an imperfect conception of, social solidarity. Man rebels against the rule of conduct because he has not a sufficiently definite understanding of the solidarity which unites him with others. He doubtless violates rules of conduct through egoism, but egoism is a motive of action which rests on ignorance of social solidarity. Here we touch the difference between egoism and individualism. Individualism, as a spring of action, is based on the clear conception by individuals of social solidarity; egoism rests on an individual consciousness which understands social solidarity either imperfectly or not at all. That is why the ancients said, so justly, that knowledge is a virtue. It is a virtue since it is a prerequisite of justice, which includes all virtues. So Aristotle and Plato rightly looked on the art of education as the essential part of the art of politics.

3: The Rule is one of Law, rather than of Morals, because it has its Basis in Social rather than Intrinsic Values of Conduct. It must, nevertheless, be recognized that according to generally admitted ideas, a very clear distinction is drawn between law and morals, a distinction which is considered to be essential. Admitting this distinction, would the rule which we have formulated be a rule of morals and not of law? We do not think so. To establish a specific difference between law and morals, it must be admitted that ethics may establish a principle according to which the worth of an act taken by itself may be estimated. Either words have no meaning, or that is ethics. Whatever that principle may be, it will be ethical only if it is a criterion which permits us to measure an act and to know whether that act is good in itself. Now the rule whose foundation and formula we have established is not such a criterion. We do not say that man should

coöperate in social solidarity because such coöperation is good in itself; but man should coöperate in social solidarity because he is man, and as such can exist only through social solidarity. This coöperation does not appear to us a duty, but a fact, which, as conceived by man, operates as a spring of action in consequence of his constant aspiration towards life — that is, towards diminution of suffering. We do not say that every act of social solidarity is good in itself. The question is not whether it is good or bad — if it were, positive science could not answer it. We say that every act of coöperation, or more accurately, every act emanating from an indivudal will, inspired by a purpose of coöperation in solidarity, has a value, which we may qualify as social, and this act claims the respect of all. Our rule, then, does not yield a criterion by which the intrinsic value of an act may be estimated, but a criterion for the determination of the social value of an act. That is where the difference lies, if there be a difference between law and morals. Our rule is, therefore, a rule of law, because it simply determines the social value of every act emanating from an individual will.[13] This brings out, besides, the difference between our idea of solidarity and the conceptions of charity and fraternity. Be charitable, be fraternal, it is said, because it is right to be so. We say, on the contrary, you are solidary because you are in fact both *individualized* and *socialized*, and if you perform an act of solidarity, others are subordinated to it because it is at the same time individual and social. The precepts of charity and fraternity are ethical precepts. The rule based on the idea of solidarity is not a rule of morals, it can only be a rule of law.

§ 191. *The Doctrine of Jhering and Jellinek, and its Refutation.* 1: UNSOUND GERMAN THEORIES OF LAW.

[13] See in addition the two following paragraphs.

Nevertheless we should not pass over in silence the purely legal doctrines which have so great a vogue to-day, and which differ so much from our own in their consequences. We have not in mind the now discredited doctrines of the law of nature which, based on subjective rights recognized in the individual, differ completely from the ideas here developed. We see in the law only a rule of social conduct, and the subjective rights of man, if he has any, arise from this rule of conduct. The doctrines of natural law, on the other hand, make the legal rule flow from subjective rights which are claimed for man as man. French legal science is being freed with difficulty from these artificial theories, but some of its representatives appear to be adopting the legal doctrines at present defended in Germany by writers of great authority.

The contemporary German theory has disdainfully rejected the systems of natural law. It starts out with objective law, that is, the rule imposing itself as such and determinative of the social value of an act; it accepts this rule with the various characteristics which we have observed in it, but holds that in itself it would not be a rule of law, — it would be a moral, economic, or political rule, but would not be objective law. It would become a rule of law only when accompanied with the sanction of material coercion. The rule of law has doubtless a social basis, but a social rule would become a rule of law only when sanctioned by organized coercion. According to this conception, there can only be a rule of law, an objective law, in a society, when there is an authority invested with material force, which either expressly formulates or impliedly recognizes this rule, and assures respect to it by coercion. In other words, there is a rule of law only where there is a State, that is, a society with an organized political power, able to com-

pel obedience. Objective law is a social rule willed by the State with the sanction of material coercion. Only on this condition is there a rule of law; law is exclusively derived from the State, it is a creation of the State.

All these doctrines originate with Hegel and Jhering. They inspire the accepted representatives of the German school of public law, Laband and Jellinek; they have a certain influence on the young French school. They lead directly to the impossibility of limiting by law the powers of the State, of explaining the character of certain written laws, those organizing the State for instance, and of finding the basis for the obligatory character of State contracts. It is important that, without going into detail, we establish the falsity of these theories.

2: JHERING'S DOCTRINE SUMMARIZED. Leaving Hegel aside, we must seek the principle of all these doctrines in Jhering's famous book, "Der Zweck im Recht."[14] Let us summarize as briefly as possible the views of the celebrated professor. Society, he says, is reducible to this formula: each for all and all for each. What guaranty, however, has society that each will do his part in obedience to the fundamental rule "you exist for me"? There are two guaranties, the two factors of social life, payment or wages, and coercion. The social organization of reward forms relations between individuals and is particularly clearly expressed in contracts and associations. The social organization of coercion brings forth the State and the law. Coercion, in the widest sense, means the accomplishment of an object through the interference of a foreign will. The idea of coercion presupposes an active and a passive subject of will, a person who wants to do something and who wishes to make another consent to his

[14] [See especially chaps. i and viii of the volume translated in this Series (vol. i, chaps. i and viii of the German edition). — ED.]

doing it. A foreign will may interfere in two ways, (1) mechanically, by physical coercion, the opposition being broken down by a stronger physical force, a process purely physical, of the same kind as when a man rolls an obstacle from his path, (2) by psychological coercion, when the opposing will is vanquished in itself by an idea, as for example by the fear of some danger or suffering. The sum of the manifestations of coercion, and of the rules relating thereto, forms what is called the system of social coercion. This system contains two functions, one external, one internal. The external function implies an apparatus of external coercion, which is the State. The State is society itself, so far as society contains the power of organized coercion. The internal function is the establishment of rules relating to the exercise of the power of coercion. The totality of such rules forms the law. Law is the system of social ends assured by coercion. Says Jhering: "It is without doubt a great advance of modern philosophy of law, as distinguished from the earlier law of nature, that it has recognized and forcibly emphasized the dependence of law upon the State. But it goes too far when, as Hegel in particular does, it denies the scientific interest of the conditions before the State came into existence." [15] So the State is a natural, spontaneous formation; it is society self-organized into a society armed with the power of coercion, in order to accomplish the purpose for which it exists by the use of coercion. The State is society so far as society has the power of regulated and disciplined coercion. Law is the totality of rules by which the State regulates coercion, and it becomes, little by little, the political system of coercion. The essential character of the State is the possession of

[15] "Law as a Means to an End," p. 178 ("Der Zweck im Recht" (1877), vol. i, p. 241).

material power, superior in a given territory to any other power, either of individuals or of groups; the State has a monopoly of the power of coercion. The essential character of law is that it is the sum of rules of coercion applied within a State. This definition contains two elements, the rule — the norm — and the realization of this rule by coercion. Rules of law alone are those established by society with State coercion behind them, hence it is said that the State is the sole source of law.

3: How Jhering Subjects the State to its Own Law. But, continues Jhering, men did not stop there, and they have come to see in law a rule, a general command, binding not only those to whom it is addressed, but also him who formulates it. Law continues to be solely the rule established by the State under the sanction of coercion; but this rule, as finally conceived, is considered as bilaterally obligatory, both for the individuals to whom it is addressed and for the State which edicted it. How may this condition be conciliated with the idea that law emanates from the State, that there is no law except by the will of the State? This bilaterally obligatory force of the law results from the *self-limitation* of the State. Of course, an individual or general rule obligatory only for him to whom it is addressed is a law, if the law be simply looked on as a set of rules imposed by coercion; but this is not enough if it be considered what the law may and should be, what it in fact is to-day,— order assured in civil society, the triumph of social over individual interests. There will be law in this last sense, there will be a law State ("Rechtsstaat"), only when State power itself is bound by the rule of law. Then only does the law appear as legitimate, then only is there a legal order ("Rechtsordnung"), then only is there a justice. Law, in the full meaning of the word, is accordingly the bilaterally obligatory force of the

State's mandate, the subordination of the State itself to its own decrees. Then only do law and coercion cease to be arbitrary to become legitimate, to become justice.

But how, says Jhering, can State power be itself subordinated, since the State is defined as subject to no superior power? How comes State power to limit and restrict itself? Simply in its own selfish interest. The power of the State accepts the law as thus understood and supports it, conceived as a rule compulsory on all including itself, because it is convinced that such is its own interest, because it understands that it can enjoy real security and uncontested authority only if it obeys its own commands. Thus law is a well considered political system of force — not one of passion and of temporary interest, but one of wide and far reaching views.

4: Jellinek Says that the State Limits its Own Action by the Law that it Creates. Jhering had a considerable influence on contemporary German doctrine with respect to public law. We leave to one side the theories of Seydel,[16] Sarwey,[17] and Zorn,[18] who see in the rule of law nothing but an arbitrary creation of the State; Zorn goes so far as to consider every decision of the State a law. These authors do not even admit the self-limitation of the State. Jellinek, however, whose authority is great both in Germany and in France, is directly inspired by Jhering. The State, says he, synthetizes all social ends; law is one of these ends, and the State consequently absorbs and creates law. The peculiar characteristic of the State is self-determination, the faculty, peculiar to the State, of determining itself, by itself and by its own will. "Both as

[16] "Grundzüge einer Allgemeinen Staatslehre" (1873), pp. 24, 31, 32.
[17] "Das öffentliche Recht und die Verwaltungspflege" (1880), p. 12.
[18] "Reichsstaatsrecht" (1895–7), vol. i, p. 108, vol. ii, p. 333.

regards what is internal and what is external, the sovereign State has the exclusive power of self-determination ('Selbstbestimmung')." "But," adds Jellinek, "just as the State possesses the faculty of self-determination, it possesses that of self-limitation ('Selbstbeschränkung'); so, as it recognizes other persons beside and below it, it creates a law for itself both as to interior and as to exterior affairs. Its own rights are limited by rights which it recognizes in others. . . . Through self-limitation the State thus gives to its own will a concrete content which binds that will. . . . It separates its own domain from that of private action, subjects itself in many cases to private law, recognizes the personality of foreign States and binds its own will by entry into the international system. By virtue of self-limitation the State changes from physical to moral force, its will rises from an unlimited power to a power legally limited in regard to other personalities." [19] A law, then, is a jural rule formulated by the State, extending or diminishing the juridical sphere of a personality; it is a rule of law because it emanates from the will of the State. And if it nevertheless binds even the State, it is because the State wants itself limited by the rule of law, by virtue of its faculty of self-limitation. After the publication of Jellinek's book "Staatenverbindungen," the objection was raised that if the State is bound by law only by virtue of its own will to be so bound, there is no true legal relation between the State and some personality, that there is private law but no public law. The learned professor limits his answer to the observation: "The opponents of my theory have assuredly not noticed that, to establish

[19] "Gesetz und Verordnung" (1887), pp. 197–8. Cf. *Jellinek*, "Die rechtliche Natur der Staatenverträge," pp. 14ff., and "Staatenverbindungen," p. 34.

the basis of public law, I have transferred by analogy to the State the principles of modern ethics, that is, moral autonomy; consequently by the negation of these principles they not only overturn public law, but ethics as well, and they end in a nihilism which makes any science of the collective life of men impossible." [20] Here Jellinek contradicts himself, for he repeatedly affirms, in his book "Gesetz und Verordnung," that law is wholly distinct from ethics.[21]

Thus, in this conception, there is no law except through the State, there is no rule of law except by the will of the State; and if a rule of law binds the State, from whose will it emanates, it is as a result of its voluntary self-limitation.[22]

5: Laband Supports the Same Doctrine. The doctrine of Laband, though less clearly set forth, appears to be identical with that of Jellinek. A general rule, conceived from the observation of social facts, may be a rule of ethics, of politics, or of economics; it becomes a rule of law only when the State, in formulating it, gives it the character of an order imposing itself on individuals with an indirect or a direct sanction.[23] Laband seems

[20] "Gesetz und Verordnung," p. 199, note 11. The opponents whom *Jellinek* has especially in view are: *Rosin*, "Souveränität, Staatgemeinde, Selbstverwaltung," in Hirth's *Annalen des Deutschen Reichs*, 1883, p. 321; *Briet*, "Zur Lehre von den Staatenverbindungen," in Grünhut's *Zeitschrift für das Privat- und Oeffentliche Recht der Gegenwart*, vol. xi, p. 97; *Gierke*, in Schmoller's "Jahrbücher für Gesetzgebung," vol. vii, new series, p. 1173.

[21] See notably his expressions in "Gesetz und Verordnung," p. 192.

[22] Besides the passages cited in preceding notes, *Jellinek*, "Gesetz und Verordnung," p. 191, writes: "Only the State has unconditioned power. It alone may command, and all power in the State can only come from the State. The power of a subordinate of the State is only a 'Wollendürfen' (permission to will), that of the State is a Wollenkönnen (power to will). All juridical power of a subject of the State is conditioned by the State and is distinguished thereby from the power of the State itself."

[23] "Das Staatsrecht des Deutschen Reichs," vol. 1, p. 430, note 1; pp. 488 and 643 (3d ed. 1895).

to admit the theory of self-limitation, however, when he writes: "In the modern civilized State, the imperium is not arbitrary, it is a power determined by rules of law; the mark of a State governed by law ('Rechtsstaat') is that it cannot require its subjects to do or to refrain from doing anything, that it cannot command or prohibit, without the basis of a rule of law. These rules of law may have their basis in customary law; in modern legally organized States they are habitually sanctioned by written law. The body of written laws limits the power of the State. They prescribe the juridical limits of the action available to the State on the persons and property of its subjects, and therefore fix at the same time the sphere in which they are juridically protected."[24]

The rôle assigned by Laband to custom, and perhaps exaggerated, in a certain sense, by the historical school, is to-day completely denied by certain authors. Custom, according to them, can be no more than a fact, suggesting such or such a rule to the mind of the legislator, but a rule of law can spring only from the action of a will which has the power to create law; this can only be the will of the State, which alone can transfer a rule from the domain of morals to that of law.[25]

6: THE ERROR OF THESE THEORIES IN LAYING TOO GREAT STRESS ON ORGANIZED SANCTION. According to these different theories, no rule is a rule of law unless it derives its obligatory character from an order of the State. In spite of that their proponents try, with little success, to explain how the State is limited by the law.

[24] Id. vol. i, pp. 653–4.

[25] *Bergbohm*, "Jurisprudenz und Rechtsphilosophie" (1892), vol. i, pp. 480ff. Cf. *Zitelmann*, "Gewohnheitsrecht und Irrthum," in *Archiv für die civil. Praxis*, vol. lxvi, p. 323, 1883; *Knitschky*, "Gewohnheitsrecht und Gerichtsgebrauch," in *Archiv für öffentliches Recht*, vol. xiii, pp. 161ff., 1898; and in particular *Gény*, "Méthode d'Interprétation" (1899) p. 276, and the entire bibliography given by the author.

If they were right, our rule of conduct based on the consciousness of social solidarity might be a concept of ethics, of politics, or of economics, but it would not be a rule of law. The theories of Jellinek and of Laband result in contradictory consequences, and like the doctrine of natural rights, point to the recognition a priori that the individual has a certain juridical sphere, that is to say a body of subjective rights. That is not, however, the question now before us. Is the rule of conduct implied from the consciousness of social solidarity in itself a rule of law, before the State has proclaimed it and made it obligatory? We do not hesitate to answer, yes. Even admitting for a moment, with Jhering and Jellinek, that the rule of law cannot be conceived otherwise than as accompanied by social coercion, must we conclude that it cannot exist till after the organization of this social coercion? Organization will give the coercion greater force, but will not create it; it will strengthen the rule of law, it will even assure a definite respect for it. But it will not create this rule of law, which existed not only before the organization of the coercion which is its sanction, but even before men were conscious of the coercion, from the simple fact that men live in society. In spite of the difference previously brought out between the physical and the social worlds, it may well be said that just as physical laws existed before they were formulated by science, so the rule of law existed before men were conscious of it. This, it is true, is more theoretical than practical, and is foreign to the realistic method, so we do not insist on it. In fact, man has always been more or less clearly conscious of a rule for his action, based on his relations with other men. This rule of conduct, more or less clearly conceived by different people, in different periods and places, is a rule of law, even before its sanction is organized by

society. Just because it is a result of social solidarity, it bears within itself a social sanction.

7: THE RULE HAS THE SANCTION OF PSYCHOLOGICAL COERCION. This social rule, we repeat, contains its sanction within itself. Even if there is no organized means of physical coercion, it is, by virtue of its own nature, sanctioned by a psychological coercion sufficient, according to Jhering's own definition, to give it the character of a rule of law. Let us make our meaning clear. The sanction of a rule by coercion can only come into play after the person subject to this rule has done something of his own individual will. If we imagine persons in a state of complete repose, it is impossible to perceive any mode of sanction whatever. To see what is the positive sanction of a rule, we must imagine that an individual subject to the rule has done something in conformity with or contrary to the rule, or wants something which the rule either permits, requires, or forbids him to want. Now, given the rule of conduct such as we conceive it, a rule social in its foundation, an act done conformably to the rule will necessarily produce a social effect, an effect of solidarity, because this act, conforming to the rule of conduct, must be an act of coöperation in social solidarity. It will therefore naturally be satisfactory to the mass of individuals who are conscious of the social bond, since the consciousness of the social bond is the consciousness of solidarity itself. This is the natural consequence of the identity which we have tried to prove between the two ideas of rule of conduct and social solidarity; they are really only one conception. In conceiving and in desiring social solidarity, men conceive and desire the rule of conduct which is its consequence, and also respect for every action which conforms to such solidarity and to such a rule; therefore the rule has a sanction, a social

sanction, it is consequently a rule of law.[26] If we now suppose an individual to act contrary to the rule of conduct, his action will do violence to social solidarity and it will be so understood by the individuals who are conscious of social solidarity, and in consequence will provoke a reaction from the mass of such individuals. Every action contrary to the rule of conduct is an injury to social solidarity; it is, consequently, conceived necessarily as anti-social. There must be, then, either social recognition for an individual action which conforms both to social solidarity and to the rule of conduct, or social reprobation for an action opposed to solidarity and to the rule of conduct. This consciousness of the recognition or reprobation of an action may be more or less obscure, according to epoch, country, or state of mind, but it is always there, just because the concept of the social bond exists. The idea of solidarity contains in itself the ideas of the rule of conduct and of its social sanction.

8: The Rule of Law is Antecedent to the Idea of the State. According to Jhering himself, a rule may be considered as a rule of law if it has the sanction of psychological coercion.[27] Is not the consciousness of the social recognition or reprobation of an act, according to whether it conforms or is contrary to the rule born of solidarity, just this psychological sanction? This sanction exists always and in every society, even in those having, by hypothesis, no conscious organized force, even in those in which there is no political power formulating

[26] [It is here evident that *Duguit* considers social sanction an essential element of the "règle de droit"; consequently the English equivalent for the term he uses is "rule of law" as distinguished from "rule of right." For by "droit" he thus means positive law, using the word "positive" in the broadest sense. — Ed.]

[27] *Jhering* in "Law as a Means to an End" (p. 283) refers to the feeling of right ("Rechtsgefühl") as a guaranty of law. Is this not psychological coercion?

rules of conduct, and enforcing them by physical or psychological coercion, even in societies which have not yet developed into States. Are there any such societies? Reasoning leads us to admit that there are. Sociologists of the highest authority cite examples of societies without a trace of political differentiation,[28] in which men are conscious of a rule of conduct. Why is not this a rule of law? Besides, what does it matter whether there are or are not societies not yet developed into States? We think that we have proved the essential point, that the concept of a rule of law, understood as a social rule invested with a social sanction, is completely independent of the idea of the State, that this conception antecedes and is above and more comprehensive than the idea of the State. We have not yet treated of the State, and through simple observation of the general structure of societies, of the conception which men have formed of them, we have reached the idea of a rule of conduct, social in foundation and in sanction, which cannot be other than the rule of law.

Let us go further. Even in societies with an organized political power, even in societies which have reached a high degree of civilization, are there not many rules of conduct, understood and accepted by the general mass of individuals, which are social in origin and which find their sanction solely in the social reaction provoked by their violation and in the social recognition which accompanies their application? These rules have, nevertheless, not yet been adopted by the State [étatisées],

[28] "Concerning the members of the small, unsettled groups of Fuegians, Cook remarks that none was more respected than another. The Veddahs, the Andamanese, the Australians, the Tasmanians, may also be instanced as loose assemblages which present no permanent unlikenesses of social position. . . . And in such wandering hordes as the Coroados of South America. . . . the distinctions of parts are but nominal." *Herbert Spencer*, "Principles of Sociology" (2d ed.), pt. v, vol. ii, § 454, p. 288.

they have not yet been formulated by the political power, which does not yet recognize their application or repress their violation. For example, the rule nowadays almost unanimously admitted which imposes on the State the duty of poor relief — can it be said that this rule has become a rule of law only by the effect of statutes which in most countries have stated it incompletely and applied it imperfectly, that it is only a rule of law so far as it is thus stated and applied and for the rest is only moral or political? We believe that there is no rule of government which is not a rule of law, and that an act which is not legal cannot be an act of government. It is high time to have done with this separation of law and politics which has been too long invoked to cover every kind of tyranny. Government is a branch of the art of law, it is not distinct from law, it is nothing if it is not the art of adapting a rule of law to facts and to men. Why should the rule which puts on the State the duty of succor, apart from the applications made of it by certain statutes, be merely a moral rule? An ethical conception can be only the notion of a rule imposing itself because the object of this rule is good in itself, whatever idea be formed of the good in itself. The rules to which we refer, in particular that which imposes on the State the duty of succor, are obligatory for men only because they live in society and because societies have at a given epoch certain needs. Precisely for that reason they are rules of law, and we cannot understand how, if they are not, they can become so because it pleases certain individuals, stronger than the others, to give them that character; they will then become State rules of law, but they were and they remain rules of law.

9: Many Rules Adopted by the State have Only a Psychological Sanction. There are a large

number of rules of the State, that is, rules sanctioned at least implicitly by positive written laws, which are really only sanctioned by psychological coercion. Speaking accurately, this is notably true of all penal statutes. It cannot be denied that in the actual state of our civilization, the rules "Thou shalt not kill," "Thou shalt not steal," are rules of law. At bottom are these rules sanctioned by direct, material means of coercion? The State makes material arrangements to prevent and repress such acts as far as possible, takes police measures, preventive and repressive, to stop the repetition of such acts by means of an exemplary punishment. The coercive sanction of the rule, however, is really the fear inspired by the penalty with which the criminal law threatens those who violate it. In a word the sanction of criminal law is essentially psychological coercion. Further, it has been maintained and with reason that the rules "Thou shalt not steal," "Thou shalt not kill," like every rule containing a prohibition, are not even implicitly formulated by the legislator, that he merely formulates an order to the rulers or to their agents to intervene when such an act has been done.[29] If this were so, the rules which forbid murder, theft, swindling, etc., would not be expressed in any positive statute, would not be invested with any direct sanction by the State. They are, nevertheless, unanimously admitted to be rules of law. This Laband recognizes. "The rule 'Thou shalt not steal' is," says he, "a rule of law, because it coincides with the statutes against theft." It is true that he adds: "The rules 'Thou shalt not lie,' 'Thou shalt not enrich thyself at the expense of another,' are certainly principles on which are based a number of

[29] *Binding*, "Die Normen und ihre Übertretung," vol. i, pp. 8, 66ff. Cf. *Binding*, "Grundriss des gemeinen Strafrechts," vol. i, p. 58 (5th ed. 1895).

prescriptions of criminal and private law, but they are not in themselves rules of law. They become such only when combined with other elements of fact, in which case a quality of legal efficacy has been conferred upon them."[30] Is the distinction exact which the learned author makes between the rules "Thou shalt not steal" and "Thou shalt not enrich thyself at the expense of another?" This we question. The only difference is that in current language the word "theft" implies the idea of an intent to injure, that the positive repression of theft may be more rigorous than that of unjust enrichment; but the violation of these two rules is an injury to social solidarity as conceived in our day, and if one is an "autonomous" rule of law, we do not see why the other should not be.

10: Finally Our Theory Permits Limitation of the Powers of the State. Two considerations, finally, seem to us to prove, contrary to the doctrine which we reject, that the idea of a rule of conduct which we have tried to make clear is truly the idea of a rule of law.

As has been already said,[31] the only value of the idea of law is that it makes it possible to limit positively and negatively the powers of the governing or of the State, to determine what the State is obliged to do and what it cannot do. To have understood this is the great merit of the doctrine of individualism, but that doctrine is based on an hypothesis; it is contrary to reality, it cannot serve to establish the original natural independence of man and the existence of subjective rights founded on the autonomy of the human being. Again, it makes it possible to determine negatively the scope of

[30] *Laband*, "Staatsrecht des deutschen Reiches," vol. i, p. 430, note 1 (3d ed. 1895).

[31] §§ 179ff. ante.

State action, but not to define the positive duties of the governmental power. It is artificial and insufficient. Our idea of the rule of law, on the contrary, lays a solid foundation for both the negative and the positive obligations of the State. Our rule is imposed by its own force on the State just as it is imposed on all individuals; the State declares it, organizes a practical sanction for it but does not create it, and is bound by it. By the doctrine of Jhering and Jellinek the State cannot logically be bound by the rule of law which it has itself created. Nevertheless these authors well understood that such a consequence would be possible only if the State appeared to the human consciousness, if not a priori at least as a natural result of the evolution of ideas, as both negatively and positively limited by the rule of law. They then took refuge in the self-limitation of the State. Jellinek does not try to explain this self-limitation; Jhering claims that the possessor of power has been led to self-limitation by a wise comprehension of his own interest, a rather hypothetical explanation, and a fragile guaranty against the arbitrary exercise of power by the State. A limitation that is willed is not a limitation for him who wills it, and if one admits only this limitation it is equivalent to going so far as to say that the power of the State is unlimited, and to proceeding logically to the extreme conclusions of Seydel,[32] Sarwey,[33] and Zorn.[34] The State, they say, limits and binds itself by statute, which creates law, and so long as

[32] "Grundzüge einer allgemeinen Staatslehre," p. 14 (1873), and "Bayerisches Staatsrecht," vol. i, p. 26 (1894–5).

[33] "Das öffentliche Recht und die Verwaltungspflege," p. 12 (1880): "The capital error of the school attached to the Kantian conception of the State lies in their attempt to build the State on the idea of Law. On the contrary, the idea of Law can only be built up from the State." Cf. *Sarwey*, "Das Staatsrecht des Königreiches Würtemberg," vol. i, p. 37, vol. ii, p. 92 (1883).

[34] "Reichesstaatsrecht," vol. i, p. 108, vol. ii, p. 333 (1895–7).

the statute exists the State is bound by the statute, that is by the law. But legislating is only a mode of State action, and if the State is limited by law, as we firmly believe, it is limited in all its modes of action, even the legislative. The State cannot do everything, even by statute,[35] but if it were bound only by the statutes which it has enacted, which it was free not to enact and which it can abolish by other statutes, it is not correct to say that it is bound by law.

11: The German Doctrine which Denies that Constitutions are Laws. Under the doctrine of Jhering and Jellinek, and the large number of jurists who follow them, it is impossible to recognize the character of rules of law even in statutes which apply only to the State, which regulate, and whose action is limited to, the internal organization of the State, the "State apparatus" to which they restrict their action, to adopt Laband's expression. The organic provisions in constitutions cannot be rules of law, because they cannot possibly be commands. Indeed, if the State alone creates law by formulating an order accompanied by a coercive sanction, it cannot address such an order to itself. An order implies two subjects, one who commands and another to whom the command is addressed; but under the prevailing doctrine of the personality of the State, the State as a person, creating the law by its own orders, cannot at the same time both command and be commanded. Hence constitutional and organic laws, which are addressed solely to the State, cannot be laws, since they cannot contain a rule imposed by a superior on an inferior. This Laband would seem to admit when he writes: "The dispositions which are restricted to the

[35] The authors of the French Constitution of 1791 well understood this. They included the phrase "The legislative power cannot make any law which" . . . Title I, section 3.

organs of the State, without any reaction on individuals, are not laws"[36]; so those dispositions which in every country are peculiarly looked upon as laws, as the "supremæ leges," would not be laws in the *material* sense. A doctrine which logically leads to such consequences is self-condemned. It must be admitted, then, that the State as legislator does not create the law, it formulates a preëxisting rule; and this rule is from hence forth a rule of law, inasmuch as a simple statement of the rule could not give it a character it did not previously possess. The rule based on the concept of social solidarity then is truly the rule of law.

12: JELLINEK'S VIEWS IN HIS "ALLGEMEINE STAATSLEHRE." This chapter had been composed when Jellinek's new book, "Allgemeine Staatslehre," appeared. The general theory of law and of the State which is there set forth remains at bottom and in general the same as it was in his other works. Nevertheless, the learned professor seems to us to have given, not perhaps without inconsistency, more prominence to the spontaneous formation of law and its independence in regard to the State. So some of our prior criticisms of Jellinek's theory as it appeared from "Gesetz und Verordnung" and "System der subjectiven Rechte" do not apply to that set forth in "Allgemeine Staatslehre." We can now even invoke the great authority of Jellinek in support of our conclusions on certain points.

The learned professor declares at the outset, and he is right, that positive science cannot determine the transcendental value of human institutions in general and of law in particular. He adds that law must be considered as a psychological phenomenon, contained in the individual, that law thus understood makes up a part of human representations, that it exists in our minds, and

[36] "Das Staatsrecht des deutschen Reiches," vol. i, p. 649 (3d ed. 1895).

that the precise determination of the law consists in "fixing what part of the content of our consciousness should be designated as law." It is, however, beyond question that the law consists in a body of rules for human action. The prescriptions of religion, of morals, of custom, have the same character, so how are we to distinguish the peculiar qualities of juridical rules? They present three essentials: (1) they are rules for the exterior conduct of men towards one another, (2) they are rules emanating from a recognized external authority, (3) they are rules whose binding force is guaranteed by an external power. By these three characteristics, legal norms are distinguishable from religious or moral norms, which lack one or the other.[37]

13: Points of Jellinek's Doctrine Here Accepted. But, and it is particularly here that we find, in "Allgemeine Staatslehre," arguments favoring our doctrine, Jellinek declares that a rule may be one of law even if it is not accompanied by a direct, material, organized coercion. Doubtless, he says, the necessary mark of law is its force of application ("Gültigkeit"); a rule does not form part of the legal order unless it is compulsory; a law which is no longer or has not yet become compulsory is not a law in the true sense of the word. It is, however, incorrect to consider coercion, properly so-called, as the sole guaranty and therefore the essential mark of law. Most frequently what is termed coercion acts only as a *compulsive* force, that is, as a determining motive, for example through the fear which it inspires; and in a general way, the guaranty which assures the obligatory force of a rule and gives it a legal character consists in this, "that the *motivating* force of its prescriptions is fortified by a social, psychological force, of such a nature that it is legitimate to expect that the

[37] "Allgemeine Staatslehre," pp. 302–3 (1900).

rule may be in a position to impose itself as a principle of action in opposition to contrary individual motives."[38] History, too, shows the existence of social forces, distinct from the State, without whose aid the State is powerless to impose a rule; and all one part of modern public law, and the whole of international law, have not the sanction of direct coercion. "It is, then, not coercion, but *guaranty*," concludes Jellinek, "of which coercion is only one method, which is the essential mark of the idea of law. The rules of law are not so much rules of coercion as guaranteed norms."[39]

We said no more than this, and we tried to show that the rule of conduct based on social solidarity is a true rule of law, because it finds in the consciousness of social solidarity that psycho-social guaranty of which Jellinek speaks, and because the evolution of objective law follows the evolution of social solidarity. The learned Heidelberg professor seems to admit, with us, the spontaneous formation of law. Two elements, in his estimation, concur in this formation, one conservative, one progressive. The former is the tendency, innate in man, to consider existing facts as *normative*, that is as the applications of a rule, and to formulate a rule obtained from such facts. The progressive element is the constant aspiration towards a law superior to the existing law, "and it is an historical fact that as soon as man began to think about law, a conviction appeared in his mind of the existence of a natural law, whose validity should not be derived from its establishment by man but from its innate superiority." That is not law, but it is an essential element in its formation, which is what the dogmatic critics of the systems of natural law have not understood.[40]

[38] Id. p. 304.
[39] Id. p. 306.
[40] Id. pp. 307ff., especially p. 323.

14: JELLINEK, HOWEVER, REGARDS THE LAW AS WILLED BY THE STATE. On all these points we accept Jellinek's doctrine, and his developments, though sometimes obscure, are singularly suggestive; but can the spontaneous formation of law, as the learned author appears to understand it, be reconciled with the idea of the State considered as a commanding sovereign power? It does not seem so to us. It is certainly, in the view of Jellinek, an incontestable fact that the State has the essential character of a sovereign, a commanding power. "'Herrschen' (to command as sovereign) is," says he, "the criterion which distinguishes the power of the State from every other power. . . . The power of 'Herrschen' is a power which cannot be contradicted. 'Herrschen' is to command without condition, and to be able to compel perfect obedience. A subordinate may escape any power, he cannot escape that of the 'Herrscher.'"[41] The State is truly, according to the author, a community endowed with the sovereign power of command, thus understood; and under this condition, what is the rôle of the State in the formation of law? Jellinek declares that the question has been badly put and therefore rendered obscure. If, says he, by "State" is meant the political community of modern times, law certainly existed before the State came into being; but if the State be conceived from the *dynamic* point of view, and be defined as a community invested with the greatest power known to the particular epoch, the answer is wholly different. Law is exclusively a social function, and consequently is born of the State, which, in its widest sense, is no other than an organized lay community, not subject to any other community. Nevertheless, in the development of law and of the State, law has not remained exclusively an affair of the State. Law has been created in collective groups distinct from

[41] Id. p. 388. Cf. especially p. 442.

the State, in families, in ethnic groups, in diverse communities. There has been, however, a tendency for the State to draw to itself all the instrumentalities of force possessed by subordinate communities, and when this process was completed the State at last became alone invested with the power of command. "Thus," says Jellinek, "not the whole formation of law, but the protection of legally established rules of law, becomes the business of the State. The judiciary power passes wholly into its hands, and jurisdiction over all matters is subordinate to or granted by the State. Hence the State finally has the right to regulate all law applying within its boundaries, so that, in a modern State, all law becomes law created and permitted by the State." [42]

15: THE ERROR OF TREATING THE LAW AS CREATED EXCLUSIVELY BY THE STATE. By a learned detour, Jellinek arrives in the end at the same conclusion as in his preceding works: law is to-day a creation exclusively and consciously willed by the State. Doubtless he does not see in this result a theoretical principle, but only the outcome of an historical process. It matters little, the proposition remains the same, and our prior criticisms seem to us to hold true as regards it. If the modern State creates all law, it creates its own law; consequently, its action will be limited, its obligations determined, only by a self-imposed law, by the *self-limitation* which appears in full force in the "Allgemeine Staatslehre." "On this self-limitation," says Jellinek, "depends the whole of public law, and therefore the whole of the law." "When the State acts by fixed rules which can only be established and changed by means of juridical forms, these rules contain in themselves the subordination of State organs to them. Thus the activity of the State itself is subordinate, since the

[42] Id. p. 330.

activity of the organ is the activity of the State itself. . . . There is, then, concealed in every rule of law the guaranty, given to the persons subject to the law, that it is obligatory on the State itself as long as it is in force. This order to its organs to respect the rules of law is not simply a free act on the part of the State, . . . but is also the accomplishment of a duty. The State binds itself towards its subjects in the act of creating law, whatever the law may be, to maintain and to carry out that law." [43]

16: JELLINEK'S EXPLANATION OF SELF-LIMITATION BY HISTORICAL EVOLUTION. Jellinek also explains this subordination of the State to its own law by an historical evolution, but the proposition seems to us just as self-contradictory. Taking the psycho-sociological point of view, which is that of the author, how can the idea of self-limitation of the State be reconciled, even historically, with the idea that the State exclusively creates the law? The conception of the subordination of the State to law seems to us necessarily to imply the conception of a rule of law anterior and superior to the State, which, besides, the learned author appears to admit. "Unquestionably at first every act emanating from the sovereign power was considered as by nature conformable to the law and never by any possibility the antithesis of law [non-droit]. . . . But in a high degree of legal development even the activity of the State as lawmaker can be juridically limited. The act of creating law, even when the result is and remains legally in existence, may contain in itself a violation of law. For a long time there has been, and there is certainly to-day, in the law of civilized peoples, a base which is not subject to the arbitrary legislative will. This results from the historical development of a people, . . . and consequently, if one abandons the purely

[43] Id. pp. 332, 434.

formal-juridical point of view, variable and constant elements may be distinguished in all law. But these *constants* are recognized as possessing this character with reference to the whole state of a people, either tacitly or expressly, and by virtue of that fact they form a *juridical standard* by which to measure acts of the State will, even though such acts may be formally unassailable. Therefore a statute or a judicial decision, from which there is no appeal, may be considered as lawless [non-droit] and not simply as unjust." [44]

17: THE DILEMMA OF JELLINEK'S THEORY. Assuredly, and our book has no purpose other than to establish that proposition; but in spite of every effort we cannot understand how Jellinek can reconcile it with the rest of his theory. The dilemma seems to remain just as it was. If the State is not that commanding sovereign power which creates law by its own will, if the State only declares and guarantees rules of law anterior and superior to it, we then understand perfectly that the State cannot do everything, even legislatively, and that statutes emanating from the so-called sovereign power are sometimes the antithesis of law. But if, on the contrary, the State is, as Jellinek affirms, a sovereign community, whose unlimited will creates law in modern societies, we cannot see any juridical limit to its creative action, and we cannot understand how a statute, an act of the sovereign, can sometimes be a violation of law. However that may be, this new book of the learned professor contains a remarkable effort to establish a juridical limitation of the State, an effort which will undoubtedly have a happy influence both on the theories of jurists and on the policy of governments.

§ 192. *The Doctrine of Gierke and Preuss.* 1: THE THEORY OF GIERKE. We cannot neglect other doc-

[44] Id. pp. 331–7.

trines whose influence in Germany balances those of Jhering and Jellinek; we refer to the theories of Gierke and of the numerous jurists who follow him, especially Hoenel and Preuss.[45] Their doctrines offer an improvement on those which we have been discussing in that they do not derive law solely from the will of the State, and have tried really to limit the State by the law. In many respects their conclusions agree with our own, but our disagreement on certain points is hopeless. Their doctrines have the fault of frequently depending on a priori affirmations, not on proofs; and their credit is due more to the authority of their propounder than to the evidence in their favor.

2: The Need for Exterior Limitation of Men's Wills, *i.e.*, Law. According to Gierke,[46] the essence of law consists in its affirmation and limitation by an exterior sovereign will in the interior of human society. As soon as a number of wills show a tendency towards realization, a legal order is necessary. There is certainly another social function which rules the will and forbids incorrect action — morals; but morals rules the will internally alone, and life in society is impossible without a rule limiting competing wills externally. This limiting rule is the law. After its appearance, law manifests itself objectively as a body of rules, subjectively as a body of powers ("Befugnisse") and obligations. As a rule, it is an external command addressed by the public authority to the wills subject to this rule; subjectively, it is the external realization of the freedom of the will, for which power ("Befugnis") opens a sphere of action and obligation establishes a sphere of restriction.

[45] Cf. *Gneist*, "Der Rechtsstaat," 1872, 2d ed. 1879.

[46] *Gierke*, "Die Grundbegriffe des Staats und die neuesten Staatsrechtstheorien," in *Zeitschrift für die Gesammte Staatswissenchaft*, vol. xxx, p. 160 (1874). See the development of these ideas in *Preuss*, "Gemeinde, Staat, und Reich als Gebietkörperschaften," 1889.

3: LAW AND THE STATE PROCEED TOGETHER. But, said Gierke, the law is no more a child of the State than the State is a child of the law; in fact, the law and the State exist at the same time, and each is born of the other. We cannot conceive either of State or law without the other; neither one existed before or through the other, and science, if it is to be strictly realistic, should fully recognize this relation. Preuss, developing the same idea, wrote: "Born at the same time like twin sisters, when humanity was established, these two ideas (law and the State) were not strangers to each other; in the course of the long development of humanity, they continually interpenetrated each other, each drawing after itself and developing the other. To-day they are developed to the point that our law has become State law and our State a law State." The State should no more be looked upon as creator of the law, from the recognition of State law, than as creature of the law, from the expression "law-State" ("Rechtsstaat").[47] According to these doctrines, the State is only a social form, of the same nature as others, and law is thus born of every social formation. "From the fact alone," said Preuss, "that two men live beside each other, arises the necessity of a limitation, under some form, of their spheres of will as regards each other, and from this necessity comes the idea of law."[48] The acceptance of a State anterior to the law rests on the confusion of one form of the development of law with the idea of law. It is, according to Gierke, a clumsy fiction to admit that at a certain moment a State existed without law, that a power first developed itself, and that only subsequently the idea of law came to light. "It is indifferent for the idea of law that there are means of external power at its

[47] *Preuss*, "Gemeinde, Staat, Reich" (1889), pp. 205–6.

[48] Id. p. 204.

service, and the law without power and without action is none the less the law. . . . Let coercion be incompletely organized, let it even, perhaps, be impossible as a consequence of the lack of a power to coerce, and the idea of law will not disappear. The idea, however, that the enforcement of every rule of law by means of coercion is legitimate and desirable, is a just one." [49] Gierke says also with much reason: "An incontestable and rational function of law is the regulation and direction of the internal life of the State." [50]

4: The State is a Legal Person. Up to this point these ideas are ours, or very nearly so; and we are happy to have the support of the great authority of Gierke. There is a rule of conduct because of the single fact that men group themselves together, and as a necessary product and accompaniment of this grouping; and this rule of conduct is a rule of law, whether there is or is not any organized coercion. We cannot follow the learned author, however, when he teaches that every collective body is necessarily a legal personality. "The State, like every other organized collective body, is a collective existence juridically ordained." [51] He holds even that the State has a double personality, of private law, and of public law in the quality of a person who commands. Preuss follows this doctrine faithfully. The essential identity of corporations and the State is the capital point; every corporation is a legal person; the State is a legal person, a conception which, Preuss recognizes, is the result of a rather long evolution. This is the only way, adds this writer, by which the State can be brought within the circle of the law, within the net of obligations with which the law surrounds all

[49] *Gierke*, loc. cit., p. 180.

[50] Id. p. 181.

[51] Id. p. 171. Cf. *Gierke*, "Die Genossenschaftstheorie," 1887.

persons.[52] On all these points, Gierke and Preuss have only a priori affirmations. For them the personality of the State is a dogma which must be accepted if the State is to be a "law-State"—a State governed by the law. For our part, we do not accept dogmas of any kind, and we hope to establish the fact that the powers of the State can be limited by law without any necessity for depending on the fiction of personality.

Is not Gierke, besides, in contradiction with himself, does he not fall back either on the doctrine of the rights of individuals or on that of law created exclusively by the State? when he says: "Although the social functions of the State and of the law are of a different nature, they are nevertheless established by each other and can be completely fulfilled only by each other. To acquire the internal force needed for its mission of civilization, the State needs the support of the conception of law. Inversely the law needs the active help of the State to accomplish its end. Without the aid of State power the law cannot fully complete its mission; it is incomplete, unsuitable to its task: law is perfected only when the power of the State is put at its disposal. The bringing forth of the law and the protection of the law are necessary functions of the State." [53] Here Gierke seems to adopt the doctrine of Jhering, of Jellinek, and of the other writers who see in the State the unique and sovereign creator of law. For Gierke the idea of law is undoubtedly independent of the idea of the State, but he does not seem to admit what for us is the essential point, that the State is obliged, by a rule of law superior to it, to fulfill its civilizing mission, that its duty of *culture* is a juridical obligation, and that the means which it can and should employ to carry out this mission

[52] *Preuss*, loc. cit., p. 213.

[53] *Gierke*, loc. cit., p. 178.

are themselves determined by the rule of law. Gierke limits himself to saying that the State cannot, in fact, accomplish its work of civilization except by means of the law. It is, then, merely in fact, as Jhering and Jellinek teach, that the State has subordinated itself to law, while for us it is in law that the State is subordinate to a higher rule which binds it to certain obligations. At bottom Gierke's doctrine on this point results in the voluntary subordination of the State to law. True, the learned professor elsewhere says: "The law for its part has to fix the limits within which should be maintained the free pursuit of individual objects as well as of social objects, by every existing will, even by that of the State." [54] However, if it is not by virtue of the law that the State is obliged to pursue its work of civilization, and if the State's mode of action in the accomplishment of this work is not regulated by the law — if in a word, in Gierke's own language, the State has separately and distinctly the two characters of law-State and culture-State — how can it be understood that there are limits fixed by law on the culture-State, that is, on the State so far as it is working for the development of civilization?

5: Individualistic Doctrinarism in Gierke. Gierke saw perfectly the possibility of this objection, but to avoid it he reached a doctrine singularly near to that of French individualism; it is merely set forth in a more scholarly and abstract form. "The law," he says, "does not include both individual and State; on one hand, the State is not only a law-State, it is also a culture-State, and in this character it has a special activity; on the other hand, the individual, on his own account, because he is an individual, has a certain sphere of activity; and the law comes forth to regulate and to

[54] Id. p. 179.

limit these spheres of activity of the State (public law) and of the individual (private law). Human existence does not lose itself in that of the race, it is an end in itself; we should recognize the individual 'vis-à-vis' the State as an original essence, existing through itself, bearing its object within itself."[55] This is pure individualist doctrine. There is a limitation on the action of the State, based upon the law, but this limitation is found in the sphere of activity belonging to and recognized a priori in the individual, "an original essence, existing through itself, bearing its object within itself." Thus Gierke's doctrine, in last analysis, results either in the creation of law by the State, or in the recognition of individual rights belonging to man as man. It rests further on the dogmatic affirmation of the pretended personality of the State, which has never been proved.

6: THE PRIMARY CONCEPTION OF THE RULE OF LAW. Our conception of the rule of law remains intact. The rule of conduct contained in the conception of social solidarity is the rule of law. Our primary idea of law is that of a rule imposing itself on men because they are individual and social, and applicable to every external manifestation of individual will without exception, whatever be the manifestation, whoever the agent of such will.

[55] Id. p. 182.

CHAPTER XI[1]

THE STATE AND LAW, AS CONCRETE FACTS RATHER THAN ABSTRACT CONCEPTIONS

THE BASIS OF MODERN THEORIES: THE STATE-PERSON — THE SELF-LIMITATION OF THE STATE-PERSON — THESE THEORIES ARE EMPTY OR DANGEROUS — THE TRUE THEORY, BASED ON CONSCIOUSNESS AND WILL — THE STATE — POSITIVE STATUTORY LAW — SUMMARY.

§ 193. *The Basis of Modern Theories: The State-Person.* Our general conclusion will be negative like the idea itself which inspired this book.

Modern theories relating to the State and to public law rest in general on the following ideas. The State is the personification of the community, conceived as a subject of law. This State-person has a will with the peculiar power of being moved to action only by itself. This power is sovereignty. By virtue of this sovereignty, the State creates objective law through its omnipotence, and assures respect for it by force. The State also intervenes to assure the progress of civilization and for self-preservation, but it never loses its character of sovereign person, and all its acts are those of a public power. More or less apparent, this character always exists. The State acts through individuals, who, however, have no power of their own, they are merely organs of the State-person. There is, therefore, a public law quite

[1] [This chapter = the Conclusion, pp. 613-618, of the author's treatise; the omitted parts elaborate certain consequences and applications of his thesis. — Ed.]

distinct from private law. It includes the rules relating to the organization of the State and to its relations with other personalities. These relations are always those of a sovereign power with another sovereign power or with subordinate personalities; they are absolutely distinct from the private relations between persons who are equal and not sovereign.

§ 194. *The Self-Limitation of the State-Person.* Nevertheless, it was appreciated that this sovereignty of the State could not be in fact absolute and unlimited; and yet, if it creates law, how can it be limited by law? For a long time it was believed that the difficulty could be settled by the conception of natural individual rights, but now it is admitted that this doctrine has no solid foundation; the new individualism itself even, if it can set a limit to the action of the State, is unable to found its obligation to act. Abandoning individualism, nothing remains but the idea of the self-limitation of the State: the self-controlled sovereign State may limit itself, and thus the whole of public law will have no other foundation than the self-limitation of the State. A sovereign collective person, an objective law created by its sovereign will, relations arising between this sovereign and other persons, relations guaranteed only by the restrictions which the sovereign is willing to apply to itself,— here are the State and public law, such as they are constructed by the great majority of modern jurists.

§ 195. *These Theories are Empty or Dangerous.* We have tried to show the nullity and the danger of these various conceptions. The personification of the State presupposes the real existence of every collective body (collectivity), distinct from that of the individuals composing it. It is admitted necessarily that this existence has never been proved; some say that this personification only exists in the eye of the law, others

that it is a fiction, others again that it is an abstraction. The science of law, however, is not in a world of its own, it is in the world of reality; it deals with concrete facts, not with fictions and abstractions. Jurists, because they have not understood this, have worn themselves out for centuries in scholastic controversies without object and without profit. Furthermore, the idea of sovereignty results inevitably in the absolutism of the State, which the theory of self-limitation is powerless to prevent. But the science of public law is not worthy of the name if it cannot establish a rule superior to the State itself, which fixes both its negative and positive duties. Finally, to make of the State the personification of the community, and to oppose it to the subordinated individual, is to create or aggravate the conflict between the individual and the community, between individual and collective interests; is to stir up the struggles of society, and to prepare the triumph, before long, either of revolutionary anarchism or of tyrannical collectivism. Behind the current formulas of jurists, we find then only emptiness or dangerous conceptions.

§ 196. *The True Theory, Based on Individual Consciousness and Will.* We must try, nevertheless, to show what the truth is. We believe that the two elementary and incontestable facts are the consciousness and will of the individual. On another side, observation shows that man is social, that is, solidary with other men. Rightly understood, this solidarity is simply the permanent coincidence of individual and social ends. Man, a social and individual being, can live only by means of this solidarity. This he has always understood, though more or less fully in different epochs. Social solidarity is accordingly the whole of humanity. Consequently if humanity wills itself it should will social solidarity. If there is a social mandate, it can only be

one of ends, that is, a rule of conduct, because it applies to wills. It may be summarized in this formula, *Will solidarity*, a rule of conduct which, though variable and contingent on circumstances in its application, is always fundamentally the same, a rule of conduct which is a true rule of law, of equal obligation for all.

§ 197. *The State.* As to the communities qualified as States, they are characterized by the fact that they show a marked and lasting differentiation between strong and weak, that the strongest monopolize a power of which they are conscious and which they have often organized. A distinction between the rulers, possessors of the greater force, and the ruled, subject to this force,—that is the State. The rule of law imposes itself on the rulers, who are individuals like the ruled. They should act in conformity with objective law and can only act within the limits which it fixes. Their will has no innate superiority over that of the ruled; like the will of the ruled, it imposes obedience on the condition that it conforms to the law and on that condition alone. The force of the rulers is not in itself legitimate, but only becomes so when it is employed to uphold law, that is, to guarantee every act of coöperation in social solidarity. Thus the State is not the exclusive representative of the collective interest, it is a conscious force whose duty it is to protect social solidarity, a beneficent synthesis of the individual and the collective interest.

§ 198. *Positive Statutory Law.* In societies which have reached a certain degree of civilization, and particularly in modern societies, the rulers formulate dispositions termed positive written laws, which are usually thought of as the creation of objective law by the sovereign will of the State. We have found that they are only the statement of the rule of law, and the organ-

ization of means designed to assure respect for it. Positive formal law is doubtless imperative, but not because it contains a command formulated by the rulers, who cannot issue commands to the ruled, being only individuals like them. Such law is imperative because it states the rule of law, which is in itself imperative. Positive, formal law besides has the same characteristics as the rule of law; it is general, continuing, and obligatory on all, — rulers and ruled; it does not create subjective rights, it simply implies objective powers and duties.

§ 199. *Summary.* A subjective situation can grow only out of the act of an individual will; it only appears when an individual will, whether that of a ruler or of a subject, is determined by an end in conformity with law,— that is, by an end of social solidarity. This subjective legal situation ought not to be brought within the a priori idea of a relation between two subjects of law, a narrow formula borrowed from the Roman law, a superannuated survival of a false individualism. An end of solidarity is willed; it should, then, be realized, and every conscious force is obliged to coöperate in this realization. All the doctrines, all the controversies on the subject of law, are pointless. Only the end of solidarity legitimates the individual will, and every individual will decided by such an end produces a legal effect which should be protected.

Individual consciousness and individual wills solidary with one another; a rule based on this solidarity, which is a mandate for individual consciousnesses and wills; individuals stronger than others, who in consequence of this rule are under a duty to put their strength at the service of solidarity; a statement of this rule by the rulers and an organization of means of sanction,— this is the State, objective law and positive formal law. The

notions of the personality of the State, of sovereignty, of subjects of law, do not respond to reality and should be definitely banished.

Perhaps we deceive ourselves. We, as well, may be putting pure abstractions in place of facts, and like the jurists whom we criticise, we may have attempted to bring within an a priori conception the highly complex and multiple phenomena of the social world. We are not blind to the imperfections of this book. We have written it in good faith, more convinced than any one of the extreme difficulty of the subject. It is possible, after all, that we have been deceived and that the truth is elsewhere. However that may be, we firmly believe that the jurists, if they persist in the road which they have been traveling for centuries, will be blind to all scientific progress, and, what is graver still, will misconstrue the aspirations and needs of our time.

(C) ANALYSIS OF FUNDAMENTAL NOTIONS — RENÉ DEMOGUE

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AUTHOR'S PREFACE TO TRANSLATION

This translation should be preceded by an expression of thanks and by an explanation.

It is an agreeable duty for me to thank the eminent members of the Committee on the Study of Legal Philosophy, who have undertaken the praiseworthy mission of presenting to the American public a selection of works by French authors on the philosophy of law. It should, however, be noted that the following translation contains only a part of the work which I published at Paris in 1910, with the title of "Les Notions Fondamentales du Droit Privé (Essai Critique pour Servir d'Introduction à l'Étude des Obligations)." In the first part of that study, which alone has been translated in this series, I have treated of the Notion and the Bases of Law.

The second, for which there was not room in this volume, while yet general, is concerned more with the notions of law currently admitted in the law of the Continent of Europe. It has for its object technic, which is first considered generally, then in more detail as legislative, judicial, and doctrinal. The rules which a correct technic imposes on legislators, judges, and writers, are laid down. After examining several difficulties of a general order, like the utility of fictions and the rôle of comparative law, attention is given in subsequent chapters to questions of application. Fundamental notions are criticised, such as those of the subject of law, the heritable estate [patrimoine], the distinction between absolute and relative rights, the content of a right from the point of view of its transformation into money, the independence of the individual from the

point of view of private law, the action at law and the rôle of the judge, and the principles of proof.

The third part of the French edition is a study of a problem which has not yet been stated by contemporary French law writers; that is, whether in our modern States, in spite of the importance of the public power, there is not a certain rôle reserved for private persons in what seem to be the special missions of the State: making laws, doing justice, commanding and assuring the material execution of obligations between individuals. The chapters devoted to these various points are intended to show that, despite appearances, the share of private citizens is important and even seems called upon to extend itself.

Thus, while it is possible to study these three parts separately, they form a single whole, united by the purpose of examining the principal fundamental difficulties which relate in their consequences not to a given juridical problem, but to the whole system of private law, and especially to the theory of obligations.

The original text was entirely revised before being translated. I have tried to make my thought clear and exact, as far as may be done in a study of general theories which necessarily touches upon a great many questions, a circumstance which forces a considerable concentration of ideas. Thanks to that, I am happy to think that the American public will have the truest expression of my thought as a law writer on the points treated.

René Demogue.

Lille, December, 1911.

PREFACE TO THE ORIGINAL WORK[1]

This book is not a study of positive law. The general principles which dominate private law have been studied in the past few years by M. Planiol and M. Capitant, whose pages render any new examination of it hardly worth while. I have adopted mainly a critical point of view, in order to show, without seeking to disguise anything, the conflicts and contradictions which will no doubt always agitate private law, and my object will be attained if I may suggest to students already through with elementary studies reflections which will help them to penetrate to the basis of institutions.

Accordingly, one may hope for a fuller realization of the transformation which is taking place before our eyes, in this matter, apparently so slow to change, of Obligations. It may better be conceived if one takes care not to forget that the imitations and consequences proceeding from one identical cause assure to all the productions of an epoch a certain resemblance, a certain style. The same clearness, the same elegance, together with a somewhat limited horizon, which are found in the art of the Trianon and the music of Gluck will also be discovered in the juridical constructions and in the style of Pothier. During a part of the nineteenth century, an ungraceful, heavy style of decoration had its counterpart in an entire legal spirit of very remarkable nicety and force, but excluding with uncommon rigor anything that did not fit directly into its scheme. In our own days an "art nouveau" has made a place for itself, aiming at a charm achieved by the flexibility

[1] [To which M. Demogue has added the final paragraph, here printed from manuscript.—Ed.]

of its forms, by borrowing from the scarcely mannerized realities of the day, and by adaptation to practical needs. When the recoil of the age shall have produced its effect, a certain music will also not seem far from being governed by these external factors. Is it surprising that all the productions of the mind form to-day a sort of symphony with these factors? Does not the spirit of the age tend to fashion unto itself a legal art suppler in its theorizing — too rigid juridical constructions being sufficiently criticized to-day — and a law in closer touch with practical realities, borrowing more from the data of political economy, and approaching more closely to that legal elucidation which, in spite of possible errors, is synonymous with life and unconsciously expresses the strongest practical needs? This is what I have sought to bring out, in applying myself, in the midst of these transformations, these diverse legal styles, to the task of locating the abiding reality that corresponds to the aspirations of our spirit.

I have sought to affirm the existence of anything that is durable in the midst of transformations and have carefully attempted to throw some light upon it in this book. But I confess that it is only with difficulty discerned, in the face of the numerous changes of social life. This is no reason for leaving its existence unrecognized, but it is a reason for not exaggerating its extent as the school of natural law did. We thus come to adopt a mitigated system, a sort of just mean between objectionable extremes, which avoids the purely doctrinary systems that have done so much to bring the philosophy of law into disrepute. We also come to close quarters with the given facts of practical life. If the result is an ensemble of highly complex observations one ought not to be surprised, when such a thing is involved as this science of law of which highly complex phenomena of social life are the concern.

(C) ANALYSIS OF FUNDAMENTAL NOTIONS — RÉNE DEMOGUE

CHAPTER XII *

THE NOTION OF LAW

THE NOTION OF LAW BOUND UP WITH THE IDEA OF A CONTINUOUS PROTECTION OF VARYING INTERESTS — REALISTICALLY DEFINED, LAW IS THAT WHICH IS IMPOSED WITHOUT RECOURSE BY AN ORGANIZED FORCE — COERCION NEED NOT BE EXERCISED IN FACT — LAW VIEWED AS A DURABLE FORCE — LAW AND NOT-LAW — FORCE AND CONTINUITY THE CHIEF MARKS OF LAW — THE RELATIONS BETWEEN LAW AND MORALITY — IDEAL LAW (EXECUTORY MORALITY) HAS A PRACTICAL USE FOR SOCIETY

THE METHOD OF ESTABLISHING THIS IDEAL LAW — THE SCHOOL OF NATURAL LAW — OTHER DOCTRINES LACK PRECISION — THE HISTORICAL SCHOOL — THE THEORY OF A LAW OF NATURE WITH VARIABLE CONTENT — SOME FORM OF IDEAL LAW IS ESSENTIAL TO LEGAL THEORY — THE LEGAL SYSTEM MUST ADAPT ITSELF TO ACTUAL CONDITIONS, YET MUST ALSO SEEK AN IDEAL — THE THEORY OF LÉVY-BRUHL — MORALITY VARIABLE, LIKE IDEAL LAW — THEORIES SPECIALLY CONCERNED WITH THE CONTINGENT ELEMENT ARE INCOMPLETE — THEORY OF TECHNIC OF ROGUIN AND PICARD — HOW SHALL THE PERMANENT GOAL OF HU-

* [Chapters xii-xxiii here = chapters i-xii (the whole of Part I) of the French volume. For this author and work, see the Editorial Preface. — Ed.]

MANITY BE DEFINED?— THERE IS AN OBJECTIVE MEANING OF LIFE, BUT IT CAN BE CONCEIVED ONLY SUBJECTIVELY — THE RECONCILIATION OF SUBJECTIVE CONCEPTIONS, PSYCHOLOGICALLY CONSIDERED — THE RÔLE OF COMPROMISE: TARDE'S THEORY OF OPPOSITION — THE RELATIVITY OF A SOCIAL IDEAL PROMOTED BY THE INSTINCT OF IMITATION IS OUR REFUGE FROM MORAL NIHILISM — THE QUEST OF UNIVERSALITY; A CRITICISM OF TARDE — IDEAL LAW HAS IDEAS OF GENERAL VALIDITY

THE NEVER-ENDING STRUGGLE OF MOTIVES FORCES US TO DEAL EMPIRICALLY WITH IDEAL LAW — OUR POSTULATE OF AN IDEAL LAW FOR EACH STATE OF SOCIETY — CAN ACTUAL LAW SATISFY THE MIND?— THE TENTATIVE BASIS OF IDEAL LAW — THE LIMITATIONS OF TECHNIC AS A RECIPE FOR LAW — THE PRINCIPLE OF MASS ACTION — JUSTICE AND SOCIAL EVOLUTION — "PRINCIPLES OF LAW" SANCTIONED BY THEIR DYNAMIC VALUE — THE OPPOSITION OF DESIRE AND BELIEF — PRACTICAL REALIZATION OF IDEAL LAW; COERCION — THE COMPLEXITY OF THE SUBJECT ABOUT TO BE EXAMINED THUS APPARENT.

"It is not given to any one to sound the abyss, but he who does not yield to the temptation to gaze occasionally into its depths, gives evidence of a very superficial spirit."
Renan, "Dialogues Philosophiques," p. vii.

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§ 200. *The Notion of Law Bound up with the Idea of a Continuous Protection of Varying Interests.* Whether a person has or has not a given right, is an idea which evidently has to do with a concern for the future. He who puts this question to himself, is interested in knowing what will happen, in case he does or does not do a certain act, and whether the consequences of his action or abstention will be advantageous to him. From this point of view, the rights which may be spoken of to him,

his possible interests, appear as varying greatly in degree. They seem to him more or less difficult to protect. Thus the fact of being owner of real property or of personalty appears as an advantage, in that, in the first place, he can take material possession of the property, even against the will of others, and in spite of the opposition of the person actually in possession. The owner can enter forcibly and install himself on his land. Ownership of personalty entails fewer sure consequences; while its mobility makes it possible to hide it for safe keeping, it may also for this very reason be stolen and not recovered.

On the other hand, the right to a good reputation is harder to guard; defamation cannot be prevented absolutely, but only indirectly and incompletely.

Not only are interests not to be valued solely with reference to the possibility of their protection by preventive means, but from the point of view of the person entitled their value is not determined with reference to the possibility of reparation of injury done to them. If damage is done to a certain kind of interests, the situation previously existing may be restored; if a wall has been broken down, a building damaged, the injury may be effaced by repairs which put the property into shape. In other cases, a more or less complete equivalent may be obtained; a sum of money may fairly well replace a piece of furniture, but it will compensate less satisfactorily the loss of a picture by a deceased master. On the other hand, there is no indemnity which will sufficiently compensate for the loss of a limb, or of life, or for slander or libel.

Interests, then, are capable of different degrees of protection, whether by way of prevention or of reparation. Every man who considers these interests sees that some are more fragile than others, because they are more liable than others to injury from untoward events.

There is a second point equally important for every one in regard to his interests; to be able to count on a certain continuity in that which concerns their protection, or even their violation. The facts which favor or injure our interests are estimated in proportion as their effects are lasting. Wind or hail which ruins a year's crop leaves a hope for future harvests; a delay in a payment, prejudice occasioned where there is a responsible person, allow the creditor to hope that compensation will be obtained either amicably or by suit, and thus are of only secondary importance. On the other hand, if a given territory is usually devastated by storms or hail, if a certain business house is solidly established in a district in which it seems likely to hold its customers, if bands of evil-doers continually infest a particular region and are not molested, if public officials seek to injure one sort of enterprise and to aid another,— these are lasting facts of great importance. Even they are doubtless uncertain, subject to destruction or change in a certain measure— nothing in this world is certain and eternal. The highest rated firms may disappear, the party in power may be turned out, administrative officials may be replaced by others of a different mind. There are, nevertheless, probabilities which, in default of something better, should be considered as practical certainties. Among these probabilities, on which watch must be kept since on them depends the safety of or the danger to interests, the first place is held by the laws of nature, which, though imperfectly understood, form a basis for suppositions which will frequently conform to the course of events. I include the laws of psychology, although they are much more uncertain and vague.

Among these probabilities which it is important to know should be classed the actions of strong, organized authorities. Composed of groups of men, they are stronger

than isolated individuals, and more apt, also, to maintain their decisions, or those which have been made by their agents or representatives in their name. They have at once power and continuity. For the protection of interests, it is important to know the habits of these authorities, the result of which cannot be avoided. These habits may be expressed in different ways, as simple usages, as customs, or as rules which they have established for the future and which they observe.

When such a state of fact exists, when there is such a probably permanent situation, whether it is a result of the action of a powerful organized band, of a State, of force or of guile, of menace, ill-will, or the corruption of individuals, it produces a certain sequence in events which cannot be neglected.

In this zone of facts capable of arising because there are strong probabilities for them, lies the law, — that vague and fugitive notion which we are about to try to fix from the point of view of observation, then from that of the ideal.

We shall take a critical point of view and shall deliberately set forth the difficulties in all their magnitude and the necessity of contradictions, differing therein from a great many authors, who, taking up the point of view of action, of force-ideas, have worked out theories which have hardly endured a searching examination and which have passed rapidly out of fashion.

§ 201. *Realistically Defined, Law is that which is Imposed without Recourse by an Organized Force.* What must be understood by law from the point of view of observation alone? When does law exist? Law is that which is imposed by an organized force from which there is no appeal. Law is practically a synonym for social fact imposed if need be by coercion.[1] When a judgment

[1] Cf. *Picard*, "Le Droit Pur," p. 40, and *Alessandro Lévi*, "La Société et l'Ordre Juridique," pp. 250ff. *Schatz* very accurately says that where there is no force there is no law, "L'Individualisme Économique et Social," p. 318. See in *Mill* the same idea, "Utilitarianism," chap. v.

regular in form and unappealable settles a point, it is law; so also when an administrative authority makes a decision which is unattackable or which has been fruitlessly attacked, or when a point is settled by a statute, which cannot be questioned according to our French notion, to the contrary of the American notion. This is the simplest and most realistic idea of the law, that resulting from observation. It eliminates from the domain of law only those facts against which an organized higher force can forearm us, or which it will make an attempt to efface directly or by equivalent. When an individual commits murder in the depth of a wood, even if he is affiliated with an organized band, a camorra, his act is not in accordance with law, because there is a higher organized power which may punish him, or force him to repair the injury.

The reason of the strongest is the best and may be termed law only if it is definitively the strongest, that is, the reason which must be finally victorious. These ideas immediately put beyond the pale of the law many acts of violence. But what shall we say of cases in which the act which might have been attacked by an appeal to the organized superior force has been passed over either through negligence or because of the trouble or expense of obtaining redress? Here again, the act is contrary to law. Even although the act has, in fact, not been redressed, and the statute, by a bar of limitation or failure of remedies, protects the position wrongfully acquired, the victim always had the law on his side, that is, the possibility of effacing the fact accomplished, of having the state of facts modified to his advantage. Observe, however, that his right, if it exists, is greatly hampered and therefore weakened. If the organized force has been put in action against an individual who is the victim of an illegal act, either by mistake, or by

corruption, or by evil intent, its action is legal, unless that organized force has a method of reversing itself, of redressing the wrongs it has itself committed, by punishing the dishonest or unjust official; but if that force does not allow any such procedure, or if he who has taken the proper step fails in his action, the law is against him.[2]

Such is the simplest and most realistic notion which we get of law through experience.[3] It may be defined as the force which is the strongest in the last resort, the force of him who laughs last and so laughs the best, as the proverb has it. It is, therefore, hardly exact to say that law is greater than force [le droit prime la force], or that force is greater than law, because law without force is not law — from the practical point of view from which we are considering it at present.[4]

Just so, in international relations, that is law which is upheld by an organized force, not alone that of armies, but also the indirect and ultimately controlling force of moral pressures, in the form of more or less solemn observations, protests, and acts of diplomacy, behind which appear the glitter of bayonets and the rise of coalitions.[5]

§ 202. *Coercion Need Not be Exercised in Fact.* It is, of course, not necessary that coercion should be in fact exercised in order that a claim may be qualified as a legal right. It is enough if the individual was in a

[2] See *Jhering*, "Law as a Means to an End" [one of the volumes translated in this Series].

[3] Compare the study of the non-omnipotence of the laws on p. 13 of *Cruet*, "La Vie du Droit," and of the privileges of the preponderating social classes on p. 203 of the same work.

[4] "Thus not being able to make that which is just strong, man has made that which is strong just." *Pascal*, "Pensées," ed. Brunschvicg, fragm. 298.

[5] Compare *Jhering*, "Law as a Means to an End." We do not even consider it wise to complicate the idea by adding that the coercive force should be the State. Why obscure a notion so difficult to elucidate as that of the law by combining with it an idea as complex as that of the State? See to the contrary *Picard*, "Le Droit Pur," pp. 41, 44.

position to call in the aid of this coercion if he had need of it in order to make his claim good.[6] As Korkunov rightly remarks, the legal order is the more normal the less frequently coercion is exerted.[7] In fact, repeated exercise of compulsion is often an evidence of weakness on the part of him who makes use of it,[8] and the time comes when a legal right cannot be upheld if it is not ratified by general consent.[9] Luckily for those who make use of coercion, human wills are not always very tenacious, and therefore bloody riots and strikes, dangerous if prolonged, are usually of brief duration.

Coercion may, of course, be moral as well as physical, the former being frequently the forerunner of the latter, and containing a warning that if it be unheeded something unpleasant will happen.

In one sense, the force of the law is greater in advanced civilizations where less physical coercion is necessary; but in such times the law is no longer the object of the same religious cult, it is appraised at the value of its content.[10] In another sense, coercion being more necessary when people are not conscious of their own interests,[11] it is made less use of when they are better informed.[11a]

[6] We therefore refuse to recognize, with *Berolzheimer* ("Rechts- und Wirthschaftsphilosophie," vol. iv, p. 90), coercion as something purely external to the law. See, in agreement with him, *Tanon*, "L'Évolution du Droit et la Conscience Sociale," p. 149.

[7] *Korkunov*, "General Theory of Law" [translated as one of the volumes of this Series, § 12, pp. 94ff.].

[8] Punishment is a proof of the weakness of governments, said *Rousseau* in "Le Contrat Social." Compare *Binding*, "Normen," p. 493, who speaks of the antagonism contained in the idea of violence used to protect the law. It may be hoped that coercion will be less and less frequently used; *Picard* even thinks that it will disappear altogether — which is doubtful. See "Le Droit Pur," p. 433.

[9] Compare *Bouglé*, "Solidarisme," p. 45. *Tanon*, "L'Évolution du Droit et la Conscience Sociale," p. 147.

[10] See *Tanon*, loc. cit. p. 154.

[11] See *Jhering*, "Law as a Means to an End."

[11a] On the psychical character of law, see *Henri Rolin*, "Prolégomènes de la Science du Droit," pp. 6ff., who shows very clearly the rôle that morality and the conscience have in the law.

§ 203. *Law Viewed as a Durable Force.* To complete the representation of the notion of law, another point must, however, be cleared up. According to Hauriou: "It is not true that law and force are identical, because in law there is a religious element which pertains to the spiritual world. It is not true that force is the parent of law; but it is true that frequently the same organizations, developed by pure force, are subsequently consecrated by intelligence and become legal. There is, therefore, no natural identity between force and law, but there is an historical advance from a situation of fact to one of law in the same subject-matter." [12]

This succession is, in a certain sense, more apparent than real, more subjective than objective. When an act of force has been accomplished under such circumstances that it cannot be successfully opposed, it is a durable fact; it constitutes legal right, to make use of the expression which we have adopted, and it is not necessary that this fact has so continued for a long time. If, however, this is objectively the case, subjectively a force will appear as invincible only as a consequence of special circumstances, of fruitless attempts to combat it, of the terror which it has inspired, a terror which has spread abroad. In general it is through continued use that a force appears as a fact which must be definitely reckoned with; and, consequently, it is only after the lapse of a certain period that this character will be recognized as belonging to it. Law when recognized as such has almost always existed for a considerable period. Often, too, with the passage of time the oppositions which it met at first vanish, even without considering that courtiers multiply about it who develop a theory for it, and justify what has been done. Every

[12] "La Science Sociale Traditionnelle," p. 195.

government has found pretended philosophers to legitimatize all of its acts, even the most abominable.

The ideas which we are here defending may be supported by the great authority of Jhering. "Law," says he, "exists for self-realization. Practical application is the life and the reality of law, it is law itself. That which does not find expression in real life, that which exists only in the statute books or on paper, is only a phantom of law — no more than words. On the contrary, that which takes effect as law is law, even if it is not on the statute book and the people and legal science have not yet recognized it as such." [13]

§ 204. *Law and Not-Law.* These statements, taken solely from observation, present to us the law in a somewhat different light from that in which it is usually shown. Obedient to the tendency of the human mind, which inclines toward simple categories, well marked frontiers, which unconsciously seeks security with a force of which we shall later have more to say, we are willing to believe that there are two distinct classes, one of illegal, one of legal, acts,[14] but we have a great deal of trouble in deciding in which class to put this or that act, and frequently end in doubt.

If we content ourselves with observing the facts, if we are interested less in simply following the tendencies of our minds than in presenting something more objective, our impressions are very different. Actual or possible facts appear as if ranged in an unbroken line between two extremes, legality and illegality. They are nearer to the limit of illegality in proportion to the interest taken

[13] "Geist des Römischen Rechts," French ed., vol. iii, p. 15. [For this work see "Law as a Means to an End" in this Series, p. 455, footnote. — ED.] See in the same sense vol. i of this work, pp. 30ff., where *Jhering* perhaps adds the embryo of a subjective idea by saying that law should be carried out as law.

[14] In this sense see particularly *Alessandro Lévi*, "La Société et l'Ordre Juridique," p. 100.

by the organized forces in preventing or arresting them or in destroying the effect of their performance. They approach that of legality in proportion as the organized forces put in their way fewer obstacles, or afford more facilities for their accomplishment, consequently making individual resistance harder, and as these organized forces are directed by more stable wills, which are capable of more perseverance, of greater steadiness in conceptions, whose execution they are thus able to assure for a longer period.

The facts thus bring us to the conclusion that these two extremes, law and not-law, are of almost less importance from the point of view of the number of acts which can be directly classed under them, than are the intermediate situations.[15] If persons in authority change their minds, if written law or custom is modified, existing rights will be affected so far as they fall within the scope of the new order. Consequently, the law is a somewhat weak support for acts which are to continue over a long period, such as are concerned in rights of property, companies, endowments, etc.; it can more be depended on for those which are to last but a short time, and which disappear almost as soon as they are done, for in such cases law is supported by the powerful force of inertia. Organized force is halted by the impossibility of reviewing all past acts, by the disorder which would ensue if it should be attempted, by the difficulties which would be met with, and thus makes use of such expressions as limitations and the various other bars to actions. It thus accepts without question facts which have been accomplished in the past, though it would not tolerate the same thing at present, and this has always been so except for rare exceptions in periods frankly revolu-

[15] *Pascal* certainly exaggerated when he said: "Force is easy to recognize and indisputable." This is not wholly, but very largely true; enough so for practical life, which must be contented with probabilities.

tionary. The force of circumstances, or better, the disproportion between effort and result, is, therefore, the strongest support of the principle of the non-retroactivity of laws.

We have thus explained that we have the law in our favor when our interest has received from an organized force, or, if it be preferred, a constituted authority, a guaranty on which it can depend as lasting.

§ 205. *Force and Continuity the Chief Marks of Law.* Force and continuity, with the object of satisfying our interest, are the principal elements which observation discloses in positive law. This analysis differs somewhat from that made by students who are satisfied to analyze the various sources of the law, statutes, regulations, custom, etc., but it must be admitted to be the only practical analysis. A right is complete only if it can be enforced, and only to the extent to which it can be enforced. A credit which is never to be paid, and from which no advantage in the way of transfer, set-off, etc., may be expected, has no practical value though it represents a right. For a business man or a man of sense, a right under such conditions is a nullity, the more so because the juridical point of view is not an invention of the mind for its pure contentment, intended to procure Platonic satisfaction, like a beautiful thought or a clever remark, but is established for a practical purpose. A right which does not properly secure the interest which it was designed to protect, is a mere unusable rusty weapon, only the shadow of a right.[16] This expression we shall later modify a trifle, by showing that this right, although without a direct practical effect

[16] *Dunan* does not go far enough when, following *Leibnitz*, he looks upon law as a moral power, as the power of ideas which seeks realization in fact. He exaggerates in concluding from this true thought, that an empirical philosophy can never find a solution to the problem of law. "Principes Moraux du Droit," in RMM 1901, p. 700.

when it encounters a determined adversary, is not, nevertheless, without a certain practical value, sometimes effective, sometimes unimportant, as a consequence of the sort of mystic or unreasoned respect which it inspires and which gives it an important moral force. Then, however, its force is no longer direct, but has rather a psychological quality which cannot be measured.

Aside from this point of view to which we shall later return, observation of life, essentially changeable as it is, makes it evident that an interest so protected by law that its realization is certain, is extremely rare, that a right has only more or less probability of practical realization, its force is never absolute, but simply relative. In many cases this relative value is enough to depend on in current life.

It may be thought that law, that force durable in its power, has rather vague limits, and this is true. Clearness of ideas is more a need of the mind yearning for security than a representation of the complex realities of life.

We must further admit that business customs, technical ideas even, may on certain sides be included in the law, thanks to the theory of negligence and to the legal consequences attached thereto. I am negligent if I fail to take the usual precautions in my shop, if I do not have the safety appliances which have been in use for several years. I am negligent if I do not observe business customs, if I do not give the usual notifications. Law stops short only of ill-established or purely social customs.

We thus impart a certain lack of precision to the law, which should not, however, frighten us. Necessities of logic or of instruction tend to make us limit our notions clearly, but we should never forget the famous aphorism, "natura non procedit per saltus." There is a series

of shadings between the "esse" and the "non esse," the law is not surrounded and set off by a deep moat.[17] The force of opinion, unorganized in the exact sense of the word, is subject to suggestion or leadership and is thus sufficiently organized to call for a certain degree of attention from men of affairs. There is an insensible transition from the characteristics of law to their absence,[18] from the coercion of the State, of the group, or of the family, to the influence of a few isolated thinkers.[19]

In any case this presentation of the law does not make room for the possibility of its defeat; it may be violated, but only to rise up immediately or almost immediately, and this seems to us better than hymns on the beauty of law followed by lamentations over its defeats, which from a practical standpoint give a very poor idea of its utility.[20]

§ 206. *The Relations Between Law and Morality.* The law which reality shows us thus covers indifferently deeds of the highest justice and worth as well as of the blackest injustice, the abolition of slavery as well as all legal murders, all legal robberies, and we reach conclusions which do not greatly differ from those of Hobbes in "Leviathan," with this distinction, that we do not erect them into theories of which we approve.[21]

Men have never been satisfied with this gloomy conception as drawn from experience, except when they

[17] Thus moral obligations, usages protected by the disciplinary law, praiseworthy actions recompensed by decorations or medals, touch the intermediate situation between law and not-law. Natural obligations, "leges imperfectæ," may be here included.

[18] Compare the different theory of *Korkunov*, "General Theory of Law," § 11, whose objections to coercion do not apply to our system of observation.

[19] *Korkunov* expresses an analogous idea, § 9.

[20] See to the contrary, *Picard*, loc. cit. p. 45.

[21] Compare similar ideas in *Danten*, "De la Nature des Choses," p. 253. We prefer to say with *Jhering*, but taking wholly the positive point of view, "Law is the political system of force," that is, of a powerful, far-sighted organization which has learned from experience.

have profited or hoped to profit from it; they have almost always appealed to a higher ideal law, the "non scripta sed lata lex," the law higher than the laws.[22]

What is this higher law? Is it morals? Not the whole of morals, but it is a chapter thereof.

It is not morals. There is no need to repeat here the explanation of the difference between law and morals, which has become commonplace, and to show that law and morals are not one and the same thing and have not an equally wide domain.

We must, however, state that law is that part of morals which seems to present such an importance that the social forces, whether organized or not, must work to achieve its application as their goal.[23]

There may be moral rules not susceptible of being applied by a resort to force, or which for some reason

[22] See in *Beudant*, "Le Droit Individuel et l'État," pp. 29 to 32, the authors who have expressed this idea since Sophocles and Plato.

[23] See in agreement *Beaussire*, "Principes du Droit," p. 65. See nevertheless *Roguin*, "La Règle du Droit," p. 103. Compare *Izoulet*, "La Cité Moderne," p. 456; *Courcelles-Seneuil*, "Préparation a l'Étude du Droit," pp. 203, 432. For another system see *Hauriou*, "Science Sociale Traditionnelle," p. 159. In agreement with us, *Jellinek*, "Socialistische Bedeutung des Rechts," p. 52, and *Charmont*, "La Renaissance du Droit Naturel," p. 123 [translated in § 46 ante]. In opposition, *Tanon*, "Évolution du Droit," p. 149, who sees in the method of its formation as a rule of conduct, custom, or statute, the characteristic mark of law. He seems to us not to distinguish between custom and morals. *Korkunov*, "General Theory of Law," § 6, defends another theory: the purpose of morality is the evaluation of interests, that of the law their delimitation, making especially to show in the law that very important element, security. If he means to speak of positive law and to state a fact, he is right, but if he means to fix an ideal, which is really his object, this seems to us inadmissible, for this delimitation will be made necessarily according to an evaluation. Later he recognizes this, but refuses, nevertheless, to refer law to morality, the very object of some of his rules being to assure to each individual the liberty of his moral convictions; but it may be observed in answer to this that, given the disparate character of various opinions, morals, a much simpler theory than is generally believed, orders exactly the same thing, which brings law and morals together. Compare on the relation of law to morals, the ideas, similar to ours, expressed by *Berolzheimer*, loc. cit., vol. iv, p. 149, and vol. ii, p. 25.

apparently ought not to be applied in that way. No one has ever thought of applying by force, at least as a general thesis, the rules to be good or kindly, not to be lazy or not to tell lies, and so forth.

There are, however, certain of these moral rules which, it seems, must be sanctioned by force.[24] Thus, theft, rape, murder, have been generally treated by systems of legislation as things which they should punish. It seems to us incontestable, almost naïve, to say that it is for reasons of utility alone — giving to this word its relative meaning of final object — that the enforcement of a part of the rules of morals is allowed by violence or trick, by the complex machinery which assures the setting of law in motion.[25] Morality is the obligation of the internal forum, law that of the external forum. And this power given to the moral rule can be explained only by the following up of an end, a utility, a finality — a certain cast which it is desired to give to society, a certain social order which it is desired to put into effect. It may be said, then, that it is for a reason of utility, of finality if one prefers, that a part of morals is executory.[26] But this statement only brings us nearer the very greatest difficulties.

The question is as to what foundation it is proper to give to ideal law, so far as it can be fixed,[27] or, if the expression be preferred, to that part of morals which is socially executory, and as to the reason why this ideal

[24] It is hard to determine where the list stops, of these rules which should be applied by coercion. See *Picard*, loc. cit. p. 391.

[25] We use the word utility to mean simply a relation, a concordance. It is thus that *Beudant* very exactly analyzed it, in "Le Droit Individuel et l'État," p. 170.

[26] I here make use of this expression of ideal law, without prejudice to the question whether there is or is not a distinct ideal, as the old Law of Nature provided, or whether there is not a natural law with a variable content, as is to-day maintained.

[27] Cf. *Jhering*, "Œuvres Choisies," vol. ii, p. 196.

law should exist and why everything should not remain in the domain of pure morals.

Let us first settle the second and easier point. As soon as the existence of organized societies is admitted as a fact of experience bound to exist in all periods, and as soon as it is agreed that the existence of coördinated social forces is, in a way, certain, so that only in moments of anarchy can it disappear, it is necessary to bow before the evident necessities born of the contact of men with one another, and of the impossibility of not fixing the limits of each one's activity.[28]

Does this mean, however, that the best rules for the government of human societies are to be found purely and simply in the application of data based on special foundations, positive or supernatural, which data would be morals?

We do not believe that ideal law is thus dependent on morals; rather the contrary. Certain rules are moral only because they are part of ideal law, or because they are imposed by political economy or social science. Morals, in fact, imposes respect for individual property, and authorizes the use of force in defense of that right, only because political economy considers this institution legitimate and better in its results than any other organized form. It if were proved that the collectivist régime were better than that of individual ownership, and if collectivism were ordained, it would be immoral to desire to substitute for the collectivist régime the one that is to-day in force. Just so, if it were decided possible and preferable to have the judges elected by the people, it would be immoral to wish to maintain the existing system of appointment.

It is these considerations of finality which should govern the establishment of notions of morals, taking

[28] See on this point *Jhering's* developments, in "Law as a Means to an End" (French ed. by Meulenaere, p. 374).

the expression in its widest sense and not giving it an exact meaning at present. Both in fixing such ends, and in indicating the means of attaining them, the economic sciences have a large place.

§ 207. *Ideal Law (Executory Morality) Has a Practical Use for Society.* So much being said, what is the practical utility in determining what this ideal law is? This utility is incontestable and appears from several points of view. The legislator may bring the ideal law into more or less complete realization, the administrative service may be inspired by it, and finally the judge, in the many cases in which he is not bound by an express rule, may apply it. In a more general way, he will try in doubtful cases to bend the positive, to the rule of the ideal, law. Finally, this latter may affect the public mind, shape opinion to certain ideas, accomplish certain reforms.

Every idea expressed and spread abroad has considerable repercussions, far and near. Expressed, it acts on the minds of many persons who, without the taste or the time or the intelligence to think out problems, are satisfied with the ready-made ideas which are presented to them. It then spreads in obedience to the important laws of imitation whose social importance is to-day recognized.[29] An ideal system of law, a formulated legislative principle, are therefore force-ideas of the first importance.

We will even add that if the law as we observe it is always somewhat uncertain, positive law, subjectively considered, through the conception which everybody forms of it, has great power. Laws are obeyed without consideration of the many instances in which they could be broken with impunity. The expression "Law," for

[29] See *Tarde*, "Les Lois de l'Imitation"; *Hauriou*," La Science Sociale Traditionnelle," pp. 278ff.

our short-sighted mentality, conjures up the specter of an irresistible power whose influence is increased by the fact that we bow before it. The human mind, eager for direction, often for quiet, is easily inclined toward submission; so the law is no longer in need of exercising force, but is peacefully obeyed, consent succeeding to coercion. In this progress, which may be slow, towards the softening of social life, we see an advance which may easily be taken for final.

On the whole it is to be desired that this ideal respect for law, although it rests at bottom on a mistake which the shrewd do not make, belief in the omnipotence of law, be developed as far as possible; that it become a sort of religion, because of the resulting tranquility and economy of social forces, for then more profitable and more effective action will be possible in other directions.

Thus from this observation of positive law, similar to that which we have just made of ideal law, we allow to the ideal force of law its proper measure of importance as an educator, a force which we seemed not to appreciate in the preceding pages in which we took solely the point of view of observation.[30]

§ 208. *The Method of Establishing this Ideal Law.* Having shown the interest attaching to the question, we should next consider the proper method of answering it. Our outfit for this purpose consists in the observation of facts, the reasoning machine which alone merits the appellation "reason," and a certain common sense, a certain good sense which the philosophers themselves decorate incorrectly with the name "reason," and which is really only a combination of sentiments whose motives fail or escape us and which we look upon as certain in spite of the dubious quality of their proofs.

[30] See *Berolzheimer*, "System der Rechts- und Wirthschaftsphilosophie," vol. iv, pp. 85ff.

We see clearly that, as to the method to follow in determining a legislative or judical ideal, we must abandon that "classic spirit" which, since Taine, it is superfluous to criticize; that we can no longer content ourselves with a ludicrous appeal to experience on which to formulate some principle which we will then make our "open sesame" of all law, a principle whose consequences must be frequently rejected or whose form is so vague, so uncertain, that it throws no safe light on the problems to be settled.

§ 209. *The School of Natural Law.* Nevertheless, numberless systems have been inspired by this defective method. First, the group of systems of the law of nature which were upheld, especially in France, in the 1700s and 1800s. Without undertaking an explanation of such well-known theories, let us content ourselves by saying with Savigny[31] that they undertook "to set above positive law an ideal, normal law which every people might adopt in place of their own system." [32]

It cannot be doubted, on consideration of any system developed from this point of view, that it could not possibly be accepted, alone from the impossibility of applying to every people, at whatever stage of civilization, in whatever circumstances, a ready-made system of law, necessarily a priori. We believe that, on this ground, the criticism of these theories of the law of nature by the historical school are decisive.[33]

[31] "Droit Romain," French translation by Guenoux, vol. i, p. 50.

[32] This idea has been advanced again in our time. See *Rothe*, "Théorie du Droit Naturel," vol. i, pp. 61ff. For more details on this school see *Charmont*, "La Renaissance du Droit Naturel," pp. 10ff. [not translated in this volume].

[33] See, in this sense, *Saleilles*, "École Historique et Droit Naturel," in RDC 1902, p. 80; *Courcelles-Seneuil*, "Préparation à l'Étude du Droit," p. 406; *Beudant*, "Le Droit Individual et l'État," p. 194. The latter seems to us less happy in the criticism, pp. 36ff., that the Law of Nature claims to indicate what should be immediately put into positive law. The trouble with this pretension is that it is exaggerated; but if

§ 210. *Other Doctrines Lack Precision.* Ought we, in default of this point of view, to accept one of the many systems which, while not pretending to construct a complete theory of an ideal body of law, establish a few principles which should not be departed from; either social solidarity, with Léon Bourgeois[34]; the idea of justice, with numerous jurists; the right of the individual, with Beudant; the inviolability of human personality, with Boistel[35]; the notion that law is liberty consecrated and regulated by duty[36]; or the principle that men in society should be in the best position to attain their ends[37] or to do their duty?[38] These principles, to which we shall return, seem to us in themselves of undoubted value, because they rest on certain sentiments or ideas; bnt the trouble comes not in affirming them, but in tracing the limits of their empire, in seeing just how far they can go in the face of opposing principles or facts. If the two essential qualities of these several principles, their extent and their force, be not determined, they remain vague hopes, unseen and, I venture to say, dangerous, for where are the guaranties against that terrible thing, the abuse of a good principle?[39] We may,

it were at bottom justified, it would be better to have a sure guide than the so-called general, really vague directions which are usually presented.

The real trouble with this theory of natural law is that it takes certain sentiments of the human conscience from which it makes hasty deductions, without due consideration of the facts to determine whether they would not show reasons which would prevent the application of the particular principle. On the insufficiency of these theories, see *Tanon*, "L'Évolution du Droit et la Conscience Sociale," pp. 4ff.

[34] "La Solidarité."

[35] "Philosophie du Droit," vol. i, p. 72.

[36] *Franck*, "Philosophie du Droit Civil," p. 9.

[37] *Stammler*, "Lehre von dem Richtigen Rechte," p. 196. [Later to be translated in this Series.]

[38] *Beaussire*, "Principes du Droit," p. 46.

[39] Compare as to the relative value of these various principles, *Cruet*, "La Vie du Droit," pp. 183ff.

in default of this system, say with Planiol[40] that the law of nature is made up of a few maxims drawn from equity and common sense, which are compulsory of their own nature on the legislator himself. They are very few, and are reduced to quite elementary notions which it would not be worth while to formulate as legal enactments. These principles, however, human liberty, protection of life and of labor, make possible only unprecise solutions, and are subject to continual objections no less justifiable than themselves. The same criticism may then be made to this theory.[41]

The same may be said, but with more reason, of those who, with Deslandres, think that they have discovered the principle of law in respect for the moral law; who wish to set up a certainty and present the rules of law as principles.[42]

§ 211. *The Historical School.* Sharply contrasted with the doctrine of natural law is, as is well known, that of the historical school, sketched out by Savigny in his Treatise on Roman Law. Popular law, according to that school, is the common basis of other law, legislative and scientific. Though sometimes hidden under them, it lives on nevertheless. This general law, on which rest all other laws, whose duty it is to accommodate themselves to it, has assigned to it a general object, that which each people is called upon to realize in history. The law-giver should keep this object in view, constantly holding fast to it without injuring the energy of individual life; in so doing he will best aid the imperceptible action of the popular spirit.[43] This theory

[40] "Traité Elémentaire de Droit Civil," vol. i, no. 5.

[41] See *Cruet*, "La Vie du Droit," p. 189.

[42] "La Crise de la Science Politique et le Problême de la Méthode," RDP vol. xv, p. 421.

[43] See among the latest statements of this theory, *Saleilles*, article cited above; *Tanon*, "L'Évolution du Droit et la Conscience Sociale," pp. 1ff.;

is very similar to that developed in about the same period by Hegel, who, in conformity with his pantheistic philosophy, sees in the history of the world and the law the Spirit of the World freeing itself little by little; the Spirit being incarnate in the history of all great civilizing nations, both ancient and modern. In Hegel and Savigny there appears the same respect for the mysterious Spirit which they believe to be in some way the explanation of sensible phenomena. At bottom this theory goes beyond a strong appeal to experience, it is the annihilation of theory in the face of facts, a veritable renunciation; and this condemns it.

§ 212. *The Theory of a Law of Nature with Variable Content.* The problem of a legislative ideal is being at present taken up in France in a new and very seductive aspect under the auspices of Saleilles, who, following articles by Stammler and L. von Savigny, has defended the theory of a law of nature with variable content.[44] After affirming that we must always concern ourselves with justice "he speaks to us of the estimate which, under the historical circumstances of a given period, taking into account the prevailing social conditions, one should form for oneself of justice" (p. 105), and he adds that a judge may apply to concrete cases the ideas of absolute justice which the abstract law of nature might have suggested to him, only if his own conception has already found outside his own conscience an objective expression which yields a juridical imperative, and if from experience he is able to strengthen his own idea. Experience is to be sought in legal analogy, the collective legal consciousness, and comparative law.

Korkunov, "General Theory of Law" [in this Series, § 19]; *Charmont*, op. cit. pp. 69ff. [not here translated].

[44] See article by *Saleilles* already cited in note 32 ante. Compare *Korkunov*, "General Theory of Law," § 9; *Alvarez*, "Une Nouvelle Conception des Études Juridiques," p. 188. In the same sense as the text, *Charmont*, § 103 ante ("La Renaissance du Droit Naturel," p. 217).

The result of these very characteristic passages is that the judge should adopt, as his legal ideals, current conceptions as shown by various means: public spirit of the country, comparative law, and others.

How shall these current conceptions be recognized, how shall we know what is the collective legal thought, the will of the legislator? The consequence will be justice estimated for a given epoch and under given conditions. Though proclaiming absolute justice, Saleilles ends in a relative theory; to him the ideal of an epoch is a sufficient image of the absolute ideal.

§ 213. *Some Form of Ideal Law is Essential to Legal Theory.* What must we think of these various systems? We believe first of all that it is possible, that is necessary, that an ideal be set above the real.[45]

The possibility of an ideal law higher than positive law is easy to understand in spite of the many arguments made against it. It has been said that the two can hardly exist at the same time.[46] Positive law, it is said, drawing all its force from its conformity to the law of nature, could not be distinguished from it, for if they differed positive law would no longer be worthy of respect, and the coëxistence of differing legal regulations cannot be explained. This argument, which made great trouble for early writers, has no effect if we note, with Jhering, that law is formed only by conflict. This application of the universal opposition makes it natural that the ideal law is often not observed. The opposite has been maintained only in consequence of a false conception of a natural order of things so powerful as to assure its own expression slowly and of necessity, without the least shock, an idea which was one of the exaggerations of the historical school.

[45] This appears on every side. See *G. Renard*, "Méthode de l'Étude de la Question Sociale," in *Revue Socialiste*, 1897, vol. i, p. 137.

[46] Compare *Korkunov*, "General Theory of Law," § 17.

Despite the historical school, despite the importance of the sociological school, which, in its wake, has believed that it could limit everything to the study of the laws of evolution, we think that an ideal is necessary, because there is in human activity a quality of the conscious and the willed which must be directed. To deny this is to put physical laws in the same rank with principles of human action, and to reduce the law to a descriptive study; it is, furthermore, to refuse to guide the legislator.[47] The result is a serious confusion, against which there is nowadays an inclination to protest.[48]

§ 214. *The Legal System Must Adapt itself to Actual Conditions, Yet Must Also Seek an Ideal.* These groups of solutions having been indicated, what must be our opinion? To begin with, it seems to us that in order to determine upon a social ideal, we must take into consideration conditions of fact,[49] either to discover absolute impossibilities or to disclose the modifications which the lapse of time, new discoveries, economic changes, have brought about in apparently identical situations. Justice requires that the relations between master and workman should be otherwise ordered when the master is only the head of a small shop, or a mechanic who gets the help of several comrades, and when he is the head of an enormous industrial plant. The legal system should differ with the difference in degree and kind of civilization; it should also pay attention to economic situations, to psychological situations, to the permanent or temporary characteristics of each people — whether it is active or lazy,

[47] Compare *Levi*, "Per un Programma di Filosofia de Diritto" (Turin, 1905), p. 147.

[48] *Gaston Richard*, "La Philosophie du Droit au point de vue sociologique," RP 1906, vol. i, p. 86.

[49] We adopt on this point of view the remark of *Courcelles-Seneuil*, op. cit. p. 207: "The source of law is very clear, it is the study of social science from all sides: the study of the natural inclinations of man, and of the necessary consequences of the different rules of law which may be introduced, in the life and development of societies."

intelligent, inclined to commerce or to agriculture, fitted for self-government, proud of its independence, or submissive to a dictatorial government.[50]

In other words, the legal system in each case should be based not only on a few apparent considerations, but on all the elements of the problem, elements constantly varying with epoch and country. Evidently there is ample room for observation in every legal problem.[51]

After a place has been made for the change in actual conditions, however, another remains which humanity should devote to a certain ideal. Though this ideal will ever be applied with a degree of caution and though its influence will always be narrowly limited, it will always be present, its influence can never be entirely abolished.[52] To have believed the contrary was the capital error of the historical school, which pictured the law as an enormous river flowing in one unchangeable direction, and thus, so to say, tried to replace the exaggerated dogmatism of the school of the law of nature with a dogmatic nothingness.[53]

§ 215. *The Theory of Lévy-Bruhl.* We feel the necessity of comparing these considerations with the theories developed by Lévy-Bruhl in his book "La Morale et la Science des Mœurs," the more so because we have looked upon rational law as a part of morals.[54] This remarkable study teaches us that there is not and that there cannot be a theoretical system of ethics. Whether combined with metaphysics, or as an inductive theory

[50] See an enumeration of these various factors in *Picard*, "Le Droit Pur," pp. 303ff.

[51] Ibid., p. 219. Compare the bond between the ideal of law and social science, *Tanon*, op. cit. p. 42.

[52] In agreement, *Beudant*, op. cit. p. 196.

[53] Compare *Tanon*, op. cit. p. 66.

[54] Connected with this theory are the ideas of *Durkheim*, "Division du Travail Social," p. 450, on the ethics of organized societies, and of *A. Bayet*, "L'Idée du Bien."

borrowing from science the needed facts, or as establishing what ought to be without troubling about what is, ethics seems to Lévy-Bruhl as equally worthless. He blames it for depending on two postulates, the fundamental identity of men, and the harmonious and organic character of the content of the human conscience, of which the first does not possess the quality which is given it, and the second is an error, the human conscience being in a state of gradual evolution.

Instead, then, of this system of theoretical ethics, on which its proponents have tried to found a system of practical ethics, we must undertake a study of the science of manners.[55] "In any society in which he lives, in our own, for instance, a normal individual finds himself under the sway of his set of social facts, facts which were in existence before he entered the society, and which will remain after he leaves it. He is ignorant of their origin or their structure. Obligations, interdictions, manners, laws, even usage and rules of decorum, he must conform to them all or suffer the penalty for his refusal." [56]

The study of the moral obligations which a society imposes on its members is the science of manners. This science will be supplemented by an art of moral reasoning which will make use of a knowledge of the laws of sociology and psychology for the betterment of existing manners and institutions. This art will develop with the progress of the sciences on which it depends, perhaps very slowly through successive and partial discoveries. Its action on reality should be "to effect

[55] ["Manners" is the English noun most readily interchangeable with the French "mœurs" and the Latin "mores." Some writers have resorted to paraphrases like "social habits" or invented new terms like "folkways." It should be remembered, however, that we possess a good old English word of flexible meaning which lends itself to this special use — a use by no means rare, and recognized in the dictionary definitions. — TRANSL.]

[56] P. 192.

changes within the rather narrow limits within which a knowledge of natural causation makes our intervention possible." There will be no pretence to a "universality of law." [57] Based on a positive study of social realities, this art will not hesitate to recognize that each society has its own morality as it has its own language or religion; and while recognizing that comparative study will be able to reveal what is common to the development of the morality of different societies, scientific intervention will not press the same measures everywhere. Taking as known all of the conditions, past and present, of two very different societies, such as our own and the Chinese, propositions for the improvement of one or the other will certainly not be identical.

§ 216. *Morality Variable, Like Ideal Law.* It is a pleasure for us to recognize the elements which are common to these ethical theories and to our conception of law. If ideal law is only a part of morals, it is not astonishing that there are theories common to both, in two regions so closely allied that they are more than contiguous, since they partly interpenetrate — notably this, that in morals, as in ideal law, there is something subordinate to times, places, and circumstances, something changeable.[58] We are the first to perceive that, in morals as in law, the rules to be proposed are, for this reason, not easy to indicate. We share no longer the enthusiasm of the 1700s, when it was believed that the rational organization of societies had been discovered all at once, and we are in full accord with this remark of Lévy-Bruhl: "The art of *social reasoning*, whether concerned with individual or collective action, must be built up from the beginning. It will only

[57] P. 279,

[58] Compare, on this point, *E. Faguet*, "En Lisant Nietzsche," pp. 324ff. Likewise see *Naville*, "Morale Conditionnelle," RP 1906, vol. ii, p. 372.

develop with the progress of the sciences on which it depends," and "when the social art begins to draw practical conclusions from the sociological sciences, they will apply in the beginning to more or less particular points. This art will necessarily seem fragmentary and incomplete, like our medicine and applied mechanics; it will not have the character of a finished and coherent whole." [59]

§ 217. *Theories Specially Concerned with the Contingent Element are Incomplete.* We think, nevertheless, that this theory shows a void analogous to that of the historical school, and that it is subject to a grave criticism, in spite of the modest attitude which it now takes. To establish an art of moral reasoning, the notion of art being relative, one must have a definite end in view,[60] one must return to the central question which may be concealed but will always exist. What is life for; what is its goal? Is there a future life, a higher life, or perhaps some other goal? We must get into these terrible problems, either frankly or surreptitiously taking them as settled in one sense or another.[61]

[59] Pp. 257, 260.

[60] Compare *Korkunov*, "General Theory of Law," "Technical and Ethical Norms," § 5, and *Jhering*, "Law as a Means to an End," chap. i. See *Tarde*, "L'Accident et le Rationnel en Histoire chez Cournot," RMM 1905, p. 346.

[61] We would address the same criticism to *Belot*, "Études de Morale Positive," 1907, p. 508, when he says that society is an end in itself and that morals is a "social technic." What are the characteristic qualities of this society for which we should work?

Furthermore, not only are other theories of morals continually being set forth (see *Landry*," La Morale Rationnelle," 1906), but that which we are criticising has been refuted by many writers. See *Fouillée*, "La Science des Mœurs Remplacera-t-elle la Morale?" *Revue des Deux Mondes*, October 1, 1905, especially p. 548, and "Doit-on Fonder une Science Morale?" RP 1907, vol. ii, p. 449; *Cantecor*, "La Science Positive de la Morale," RP 1904, p. 237, chiefly p. 391, and "Étude de Morale Positive," RMM 1908, p. 66; *Gaultier*, "L'Indépendence de la Morale," RP, 1908, vol. i, p. 271. Especially will ideas similar to our own be found in the previously cited article by *Naville*, "Morale Conditionnelle," pp. 561ff. *Lévy-Bruhl* tried to answer these objections by showing that an ideal may be uncovered little by little and may vary

As Renan very well observed,[62] "Beside the 'fieri' we must keep the 'esse'; beside movement, the mover; in the center of the wheel, the rigid hub." Likewise the improvement of manners or of law must be directed towards a fixed object, or the relative will not indicate a relation with anything, which is inconceivable.

Besides, all is not settled when this question is put, or even looked upon as answered, which has always haunted humanity, even against its will. This goal of life, what is its worth with reference to complex and variable facts? What is the relative measure of these two quantities? When should man, obedient to one or perhaps several higher principles, resist the special conditions which we have discussed? When should he bow before them? Are there instances in which he ought to be a reformer, and, let us be frank, a revolutionary?

§ 218. *Theory of Technic of Roguin and Picard.* Some people have thought that to humanity must be ascribed stability in certain relations, and that here was to be found an aspiration of the mind which deserved consideration. In default of an ideal, they have inquired, wholly from the technical point of view, into the security that people demand, and have developed the theory that laws must obey certain rules, and must always be run in certain molds. This is the tendency to which we owe two books, that of Roguin on "La Règle de Droit" and that of Picard on "Le Droit Pur"; in these two remarkable works occurred the first and very modest manifestation in favor of a renascence of the law of nature.

with the times, RP 1906, vol. ii, p. 11. He thus himself brings the ideal into the circle of this study.

Besides, all art includes one or many ideals. So it is with the arts of the beautiful. If medicine were further advanced, it would question whether its object should be a long life with reasonable health, or perfect health and a shorter life if necessary.

[62] "Dialogues Philosophiques," p. 146.

There was evidently an approach to truth in their attempt— in their notion that the very idea of law implies that certain ends necessarily pursued require certain rules. But how inadequate this notion![63] Later, in our study of technic, we shall have occasion to show that there is something variable in these technical rules, according to the end pursued. These studies were only the first very prudent steps towards a bolder attempt, the definition of a certain ideal.

§ 219. *How Shall the Permanent Goal of Humanity be Defined?* How shall we define this necessary ideal, whose application will be more or less wide according to circumstances,[64] but whose importance will be undeniable? Saleilles, in the article cited, indicated that it is justice, but is this very comprehensive term enough to solve clearly the obscure and complex problem which is occupying us? Let us seek to fill in the details of the sketch made in his remarkable study.

It must first be noted that we are quitting the land of contingencies and are consciously seeking a permanent ideal. In fact the void left by Montesquieu in his "Esprit des Lois" consisted in speaking of justice as a simple relation of propriety existing between two things, without putting into his definition anything permanent, any abstract ideal.[65] This ideal to be defined, which we seek above the numberless complications of actual facts, is the very goal of life.[66] It is not that subjective

[63] Cf. *Jean Escarra*, "Remarques sur le Droit Pur," RDC 1909, pp. 111-115.

[64] Note that this idea, that there is an ideal of Justice capable of a certain adaptation to circumstances, is quite familiar to modern lawyers. See *Aubry et Rauh*,"Droit Civil," vol. i, p. 2, 5th ed.; *Baudry-Lacantinerie et Fourcade*, "Les Personnes," vol. i, p. 3; *Pillet*, "Principes du Droit International Privé," p. 2.

[65] See *Beudant*, loc. cit. p. 114.

[66] As *Kant* showed in his "Métaphysique du Droit," in saying that man is an end in himself, and in taking this as the basis of law. Cf. *Oudot*, "Essai de Philosophie de Droit," p. 14; *Ahrens*, "Encylopédie du Droit," p. 119.

goal which each one has created for himself out of his own imagination, his own tastes and beliefs. It is the goal of life considered objectively, a goal which must exist outside of ourselves, and which is so powerful that it controls every one; a goal which it is the duty of every one to attain and to allow or even to help others to reach.

Does this objective goal exist, however, and if it does, what is it? For we cannot be satisfied by this vague expression any more than by talk of the nature of man.

To affirm or to deny its existence is to express an opinion on one of the most serious, I may even say the most serious, of the questions of philosophy, and to indicate its content is to attack a difficulty which can hardly be settled except by intuition. We are outside those questions which may be grasped and explained by observations of fact and by reasoning.

We can approach this objective problem only through our subjective ideas,[67] let me add through our feelings, asking ourselves whether a certain conception, from which may hang long chains of consequences, is in accord with our consciences, that is, with one of the vibrant but most obscure parts of our souls. When we apply the sole and necessarily imperfect method of attacking this disturbing problem, our subjective ideas being no absolute criterion of objective truth, we see many different if not contrary conceptions strongly presented to our attention.[68]

[67] *Bierling*, "Juristische Prinzipienlehre," vol. i, p. 145, observes that there is both a subjective and an objective element in law. See *De Tourtoulon*, "Principes Philosophiques de l'Histoire du Droit," pp. 19ff., 55.

[68] It is not enough to talk with *Ahrens* of the nature of the being as a basis for law ("Philosophie du Droit," vol. i, p. 101) or of social utility with *Vander Eycken* ("Méthode Positive d'Interprétation," p. 56). Is it even enough to say, with *Jhering*, law guarantees the conditions of life in society, that is its goal? ("Law as a Means to an End," pp. 330ff.) Such conditions are the preservation of the species, work, and legal transactions. Even here it will be necessary to know according to what

Has life a goal beyond itself? Does humanity exist simply for a higher Being on whom it depends and to whom it owes its own existence? [69] Must we, in default of a goal, give to life only one direction, one line of march: is it something which should have in view principally and especially the development of life, the increase of the race? This increase would then become the object of a half superstitious respect, as manifested even in the basest and most pitiable forms of humanity, in the insane, in criminals, in the densest of intellects, always with the doubt whether this respect is no more than a means to another deeper end. Must we, in a word, say with Courcelles-Seneuil that law, like morals, should be ever mindful of its supreme utility for the human race, definable by those conditions which develop in it the greatest sum of human life? [70]

Or must we say that the ultimate end of humanity is to bring forth great men? [71] The great work of humanity will be accomplished through science. The essential thing is to produce great geniuses and a public able to understand them. The masses count for little, nature does not trouble with them. All should serve higher ends. Each is happy in his place; the élite of intelligent beings dominating the world so as to secure the reign of the most of reason possible, the goal of nature being not that all men should see the truth, but that it be seen by a few who should hand down the tradition.

Or should one see the goal of life less in the development or happiness of future generations than in the hap-

plan or with what object in view, life in society should be organized. This he does not tell us.

[69] *De Vareilles-Sommières*, "Principes Fondamentaux du Droit," pp. 34ff.

[70] Op. cit. p. 424; compare "L'Utilité comme Principe de Morale," pp. 371ff.

[71] See *Renan*, "Dialogues Philosophiques," pp. 96ff.

piness of existing individuals?[72] This means embracing ends on a plane low enough for the mass of human beings to profit by them. The result would be that humanity would become "a degenerate mob without other desires than to taste the ignoble pleasures of the vulgar"; at most we should merely try to persuade this humanity to seek nobler aims. And will this happiness, differing in particular cases, be an existence of excessive activity, or a calm life of mildly relished sensations, — the two extremes which may explain the difference between the occidental and the oriental conceptions of life?[73]

Is liberty the ideal of society?[74] Such a doctrine is vague, for does this liberty solely guarantee to each individual a limited ideal, or is it a means of exciting the desire for an active mode of life? Is it not, at bottom, a doctrine of despair, the doctrine of those who, hopeless of pointing out a safe road to humanity, seek to abandon the individual to himself to the largest possible degree, permitting regulation only to the extent of warding off too violent shocks?[75]

[72] These conceptions of life react at once on morals and on law. "If the new morality corresponds more to the needs of interests which are more numerous, less particular, more extended, the old was adapted to those more durable. The extent of the sacrifices demanded by present-day duties extends proportionally much further in space than in time, whereas formerly they had a utility narrowly circumscribed by the immediate surroundings of the individual, but prolonged in a relatively considerable future. All virtues properly domestic and patriarchal, local and primitive, are privations undergone for the sake of a single family, it is true, but for all the posterity of that family. Modern morals, on the contrary, very accommodating in regard to the vices from which our grand-nephews only will have to suffer, blames severely the faults which will affect even far distant contemporaries." *Tarde*, "Lois de l'Imitation," p. 388. The great importance of these ideas is apparent when they are applied to grave problems, of alcoholism, the social evil, the marriageable age, the marriage of incompetents, etc.

[73] On the characteristics of western civilization, see *Kidd*, "Social Evolution," French ed. pp. 117ff.

[74] This is notably the tendency of those who, with the old formal theory of law, define law as a delimitation of wills and not of interests. See *Korkunov*, "General Theory of Law," pp. 104ff.

[75] Observe also how hard it is, in a general way, to compare the value

The value of these varied conceptions, and there are perhaps many others, is hard to estimate by our usual methods, statements of fact and deductions therefrom; for we should have to find something, to begin with, which cannot be found in a certain order of nature which is not necessarily applicable to man. What, for example, is proved by the fact that solidarity exists in nature, which commands man to conform to it — a being of a unique species, the master of lower beings? Has he not, rather, reason to depart from it, if, because of this solidarity, "nature sacrifices whole species so that others may find their essential conditions of life?" [76] If nature has such a law why should we not try to limit it just as much as to follow it? Should we not say that "men must be petted and consoled for nature's necessary harshness?" [77] Just one thing would be really conclusive,— proof "that there is an orderly plan which is imposed on us and which guides us," and which we cannot avoid following; or which corresponds to our ideal, so that we should try as far as possible to realize it. But we must begin by establishing this ideal. If nature, as Renan remarks, acted towards us like an oriental potentate towards the Mamelukes whom he employs for mysterious ends without ever showing himself to them, we could not submit to play the rôle until we had estimated what it would be worth to us to do so. Furthermore, is it easy to know what is this pretended order of nature, to which it is argued we must submit? As Bouglé says, complete objectivity gives no principle of choice; too many roads lie open before us.[78] Facts speak several languages.

of the diverse conceptions in question. How may we compare the advantage of the quiet and orderly life of a great many with a régime favoring, in a large way, discoveries which would overturn society all of a sudden?

[76] *Renan*, "Dialogues Philosophiques." p. 103.

[77] Ibid., p. xvii.

[78] "Solidarisme," p. 39.

In fact, sentiment, a feeling which has been developed by several brief experiences, most frequently decides our action. It is a highly subjective process and we can find in it no reason for imposing our ideas on others. It is only as the consequence of a happy combination that the same conception of life may so prevail in a certain epoch or country, or in a great number of countries, that it can serve as a guide to the legislator, independently of its objective value. In such cases, it actually directs him, which does not necessarily mean that it directs him in the right course. It is frequently said nowadays that law should be guided by current ideas, by the varying conditions which crop up; Picard says that the legislator should be simply the midwife of the needs of the nation.[79] But have not just such national tastes, just such unity of desires in a particular period, led people to their destruction? Have not races disappeared because they followed their racial tendencies to the end? Have they not, by abuse of their own ideas, dug their own graves? These are the reasons why I cannot accept the language of Poincaré, that what is common to several minds is objective — which does not prove that it will belong absolutely to truth.[80]

There may be happy periods, with perhaps terrible to-morrows, in which appears what I shall term a universal subjectivism developing an idea which the legislator will share with the public, as one of that public [81]; but how rare are such periods! Humanity, much more decided on its solutions of particular problems than on its general theories, as the former are more within the reach of its short-sighted understanding, is uncertain

[79] "Le Droit Pur," pp. 196, 456.

[80] This language tends to confound objective truth and certain facts admitted by general consent, which may very well be errors, and are no more than beliefs of the loosest subjectivism.

[81] "La Valeur Objective de la Science," RMM 1902, p. 288.

as to the course which it should pursue. Opinions vary in different individuals, in different moments in the life of the same individual, and it is striking to note how many questions are carelessly settled because they cannot be easily studied by the usual methods.

§ 220. *There is an Objective Meaning of Life, but it can be Conceived only Subjectively.* What shall we conclude from all this discussion? We are unwilling to think, though it may be a postulate, that there cannot be objectively a meaning in life. Such a meaning, however, we can only conceive subjectively, and law, which is nothing more than an instrument used for various purposes, must concern itself with these conceptions which are the imperfect, erroneous image in our minds of an exterior truth of which we shall never have certain knowledge. Every conception is subjective by nature, from the fact that it must pass through a human brain. It may be limited to one country, to one epoch, party or class, to a chosen few, or even to one individual.

What a great difference there is between the social conceptions of a Hindu scholar or the imam of a splendid crumbling mosque in Persia, between conceptions of a calm, contemplative life, of a life of beauty, and our occidental conceptions of activity, of social equality, of luxury, frequently brutal, or again, an American's ideas of the strenuous life? Here we seek in vain a common ideal. What a difference, too, in our occidental temperaments, between a part of the élite of France, "the most idealistic people which ever existed," and our neighbors across the Channel solely preoccupied with positive results, careless of general ideas, of comprehensive views, of clarity, a people both conservative and practical. Even in the same country, how many transformations occur in the ideas of a majority of thinkers in the course of the centuries, or of one century alone!

Not only may the course of thought be changed by important events like the Franco-German war of 1870, but it deviates of its own accord little by little from its primitive course. How great, for instance, has been the growth of the idea of intervention in the last twenty-five years!

Besides, is it easy to establish what are the dominant conceptions in the same country at a particular time? Each party has its own; each profession, even, develops a special conception of utility.[82] We must, too, recognize that behind ideas is the important force of appetites. Every one wants to satisfy what may be an enormous appetite, and how many men are peculiarly skillful in adorning their special interests with general conceptions![83] How many decayed aristocracies, under the pretext of preserving the cult of ideas to-day abandoned, have as their real bond the wish for a daily communion, in spite of change, in their own sort of pleasure! Frequently, too, are not our general ideas only our personal desires with which, with the best faith in the world, we freely endow humanity, and which we make the center of the world?

How can we, in such confusion, in view of such mobility of ideas and conceptions, successfully establish what is the ideal law? It is not enough to set up a conception of social utility and call it the only one really worthy, for ideas are not made objective by assertions alone; an idea is not necessarily worthy just because I believe in it. On the contrary, if we wish to make law adapted to social needs, we must certainly go beyond material considerations, we must consider ideas. A man's happiness does not merely consist in bread to eat; the

[82] In this sense, every theory is good as responding to the ideals of some one of its authors at least.

[83] See *De Tourtoulon*, "Principes Philosophiques du Droit," p. 158.

satisfaction of his ideas may be as dear to him as that of his material needs. The Hindu Brahman who would risk his life to keep an infidel from seeing the statue of his God, the monk who leaves his convent only when compelled by force, the man of strong convictions who is willing to injure his pecuniary prospects by helping to pass anti-clerical measures, are all dominated by the same idea,— all attach more importance to the satisfaction of their spiritual than of their material desires.

As a practical consequence we may conclude that it is especially in the domain of material needs that common characteristics can be found among men in a given country and time. Furthermore, it may be affirmed, without any pretense of resuscitating the old doctrine of the law of nature, that thanks to these material necessities there is in every country a fairly solid basis for part of the philosophy of law; at least the end to be attained is quite clear. This is, of course, not the whole story, for many roads may lead there, but let us reserve the question which is the best.

§ 221. *The Reconciliation of Subjective Conceptions, Psychologically Considered.* To sum up, we reach the conclusion that there is, superior to the impelling facts, a certain ideal for law, but that we are never sure that we have discovered it.

Understanding that we can never be sure of reaching an objectively true theory of the meaning of life, we should concern ourselves with the prevailing subjective conceptions, since the problem of ideal law must be settled, and from this point of view every one must make up his mind to something, at least to the extent to which he contributes to form public opinion. We cannot, however, attach to such conceptions an exclusive importance.

We are confronted by a problem which we must solve, even if we lack the elements scientifically necessary for its solution. We must solve it by *study of the human mind*, taking into account the *general psychology of man.*

In the first rank of the subjective conceptions which must be taken into account are the moral conceptions, good, evil, justice, and liberty among them, and also the other fundamental ideas which we shall treat in succeeding chapters. By their own definition, however, these are limited and must be considered in relation to the whole mass of social facts.[84] Relative itself, our conception of the absolute should be reconciled and put in touch with the other relative elements. This alone will not, however, settle the problem, for who is to be the judge of the relative value of the various ruling conceptions, or of the peculiar applicability of one or the other to a given case or to the elements, variable in their nature, of the problem of legislation?

Confronted by questions so complex, what shall the law do? One thing is certain. In presence of very diverse conceptions, of impelling facts, the law is forced to meet problems which it may properly seek to settle by reconciling divergent points of view. This is already a notable art whose development seems to us almost indefinite, for new problems are constantly presented, new discoveries being made which we cannot foresee and which tend to perfect it.

Many cases, however, occur in which certain elements of the problem will seem, and doubtless will be, really irreconcilable, because they are so numerous or because they cannot be measured by a common standard and are so dissimilar that their relative values cannot even

[84] On this point we agree with the remark of *Landry*, "La Superstition des Principes," RMM 1903, p. 121, that principles have no absolute value, but are beneficial to a certain degree on account of man's imperfections.

be approximated. There is no true science except that which involves quantities which have a common standard or are at least approximately measurable. The law in such cases can only eliminate certain elements and adapt existing means to the end or ends accepted. This limited reconciliation, or this adaptation of all things to a single end, is in itself an important work whose success is not negligible.

The object which must be sought, though in part impossible of realization, is the reconciliation of differing theories. Simplification, through unity of idea and logical deduction, is a mental need which does not completely correspond to reality, as we clearly perceive when we see the philosophy of law always ending in the defense of a compromise or of an apparently simple principle which hides a complexity. Facts are too divergent to be bent to conform to the nature and need of action of our minds.

§ 222. *The Rôle of Compromise: Tarde's Theory of Opposition.* The very necessity, however, in which we thus find ourselves of leaving out of consideration certain elements, certain desiderata, forces us to accept solutions which, though qualified as better than others, are none the less imperfect. As the adversely affected interests are often important, whether equal to the protected interests or not, and as men recognize evils from which they suffer more easily than advantages from which they profit, there results a need of change. This usually develops slowly at first because of hostile interests, of routines which it disturbs, of the force of imitation which it must combat, but it is the beginning of an evolution which follows the line of least resistance.[85] The result, however, is often no more perfect than what

[85] This is, naturally, conditioned by many elements which we cannot mention here. Compare *Picard*, op. cit. p. 303.

preceded; new movements spring up,[86] and thus it is that we notice sometimes a curious backward trend,[87] though with improvements on the past. For there is one thing susceptible of very prolonged development: the technic, the art of reconciling interests by measures better adapted to the end pursued. What an improvement do our modern institutions show, with their developing tendency to formalism, over those of the ancient formalism, of the Roman law for instance!

Evolution no longer appears to us as of the rectilinear or at least regular character, as of the character of a law

[86] This has been well expressed by *Tanon*, "L'Évolution du Droit et la Conscience Sociale," p. 24.

[87] *Tarde*, "L'Opposition Universelle," p. 201, very well says: "Whatever be the method employed to suppress the conflict between beliefs and interests and to establish an accord between them, it almost always happens [does it not always happen?] that the resulting harmony has created a new variety of antagonism. For the contradictions and differences of detail, a contradiction, a difference in mass has been substituted, which seeks settlement, at the risk of arousing still more important opposition, and so on to the final solution. . . . The progress of science reveals rational antinomics, soluble or insoluble, which previous ignorance had hidden. . . . The question is whether this change in contradictions and differences has been advantageous, and whether it may be hoped that harmony of interests and minds will ever be complete; whether, in other words, a certain amount of untruth and error, of dupery and sacrifice, will not always be needed for the maintenance of social peace. When the result of the change is to centralize contradiction and difference, there is assuredly an advantage. However profound be the mysteries revealed by science in its progress, however deep be the abyss created between schools of philosophy by new questions, in which arguments on each side are drawn from the same scientific arsenal, we cannot regret the times of ignorance in which these questions were not raised."

See in agreement, in regard to contradictions to-day appearing as fatal, but which mark great philosophical progress, *Hauriou*, op. cit., pp. 110ff.

We agree in part with these ideas. We think it an exaggeration to affirm that progress always consists in a centralization of contradictions. We believe that such is scientific progress, but it is not the path to be followed in practical life. Many conflicts are settled in practice only because it has been possible to dissimulate them by decentralizing the debate. So tolerance and urbanity, themselves uncertain in limits and so possible sources of conflict, deconcentrate certain conflicts, chase away certain contradictions which nevertheless subsist. The concentration of conflict is, then, neither necessary nor always to be approved in practice.

of destiny, which persons have tried to give to it, but as a series of unfortunate attempts, more or less successful, to make conceptions without doubt largely irreconcilable get along together.[88] It results from this situation that the movements of ideas can very rarely be pushed to their extreme limit, because of the opposition of principles unequal in value to those of which one wishes to see the triumph and which cannot be reduced to nothing.[89] There are extreme positions which cannot be attained, or are attained at most for an instant only under exceptional circumstances, to be promptly abandoned. It is usually a great misfortune to push a principle to its logical end, as the Roman lawyers well expressed in the sentence, "Summum jus summa injuria." There are extremes which it is dangerous to reach; the result is reaction and disturbance, a state of fact which is always dangerous. Humanity is thus required to make compromises which limit the length of what I shall term the oscillations of evolution, which will probably never find its equilibrium,[90] for the reasons which I have just given.[91] Thus, while rejecting the

[88] As *Tarde* well says, "Lois de l'Imitation," p. 75, "all inventions are not cumulative, many are only substitutes."

[89] What *Picard*, "Droit Pur," p. 344, calls the parallel and normal expansion of great social forces. Cf. ibid., p. 399.

[90] As *Tarde* remarks, op. cit. p. 79, equality is only a transition between two hierarchies, as liberty is only a passage between two systems of discipline.

[91] "Summed up, all exterior realities, of physics or of life, present the same spectacle of infinite, unrealizable and unrealized ambitions which both urge on and paralyze one another. What is called the fixity, the immutability of the laws of nature, the reality of realities, is at bottom only their powerlessness to proceed further in their truly natural path and to realize themselves more fully. It is the same with those fixed (momentarily fixed) social influences which statistics discover, or pretend to discover; for social realities, ideas and needs, are no less ambitious than other realities, and into them, on the last analysis, are resolved those social entities known as manners, institutions, language, laws, religion, science, industry, and art." *Tarde*, "Lois de l'Imitation," p. 129. Compare *Izoulet*, op. cit. p. 647 ("The great problem, the synthesis of solidarity and liberty—which is but a compromise").

theory of the golden mean which sees a perfectly exact answer for every problem in a median solution, we can only say with old Horace, "Sunt arti denique fines quos ultra citraque nequit consistere justum." Seek mitigated solutions, compromises, though but temporary; such are the conclusions of this book, which, though they may be a little vague are nevertheless in our opinion capital.

The contradictory elements frequently found in problems before us render a satisfactory solution often impossible, and throw us into a régime of concession, of compromise,[92] in which neither principle is too far or too plainly departed from.[93] Although not logically derived from any absolute principle, this is the only possible régime; but, open as it is to criticism, it is always very fragile.[94]

[92] The need for compromises to end social contradictions has been well set forth by *Hauriou*, op. cit. pp. 114ff. He shows that we have three ways of escaping contradictions: elimination, synthesis, and compromise. This latter plays an important rôle, it is met with everywhere and in all social institutions. Compare, on the application of the idea of compromise, although the general principle is not expressed: *Cruet*, op. cit. p. 302; *Picard*, "Droit Pur," p. 241, who says that rights should be made use of with due regard to society at large.

[93] Compare *Mill*, "Logic," Book II.

[94] So, with these given circumstances, we believe *Tarde's* theory quite admissible: that society passes through periods of custom imitation, then of fashion imitation ("Lois de l'Imitation," pp. 267ff.), to return to an intermediate stage; a theory which *Hauriou* has used, op. cit. pp. 253ff., to base an assertion that the world passes through periods of Middle Ages then of Renascence, to end in a half Middle Age, that is, an intermediate condition.

Social evolution, then, would resemble a series of oscillations gradually decreasing in swing, only we do not believe that this pendulum can ever find a point of rest. As the state reached will always be unsatisfactory, new movements will probably begin. Often, in fact, rather unimportant demands finally develop such a desire for what was demanded, that people will be ready to overturn everything to gain that desire. Thus revolutionary Syndicalism arose from disputes as to wages. See *Max Leroy*, "Syndicats et Services Publics," p. 188. Then, from this strife, develops another oscillation along a new line. From this we perceive the benefit of making exaggerated demands, of revolutions, which put into movement great forces to produce small effects. Finally we must not forget that new elements crop up which will deflect and perhaps accelerate the swing of the social pendulum.

§ 223. *The Relativity of a Social Ideal Promoted by the Instinct of Imitation is our Refuge from Moral Nihilism.* Such is the future which seems to be reserved for the law. At first sight, the difficulties doubtless do not appear as difficulties, and for two reasons. First, the inconveniences of a solution once adopted may be attenuated by habit; the instinct of imitation causes a certain solution to be long considered as the least evil until an original thinker makes the public see another, which spreads through the instinct of imitation. Then we say with Pascal: "Custom makes the whole of equity solely because it is received. This is the mysterious foundation of its authority. He who refers it to its principle destroys it."[95] And the tradition is promptly rejected.

Secondly, many circumstances in modern civilizations tend to mask these difficulties. The ease with which ideas are spread through newspapers, books, schools, develops a series of short-sighted arguments, accessible to all, a series of ideas looked upon, at least for a time, as invulnerable. Originalities, developing from differences, are effaced before a flat and convenient uniformity of thought.

Belief in the absolute value of ideas favorable to the continuance of this instable equilibrium has the further advantage of corresponding to what is, especially in our country, a mental need — simplicity. The simpler the argument the stronger its hold on the intelligence, and consequently our minds incline to falsify reality, to endow it with a uniformity which it does not possess, just as a ray of colored light gives its own color to objects in its path. They are shown clearly but falsely. Thus does one often proceed, and he who responds to this appeal of our being has the best chance of pleasing it.

[95] "Pensées, ed. Brunschvicg, fragment 294.

Add to this the mental limitations or the press of other matters which keep the majority from a deep study of problems whose solution may be unpleasant.[96] In spite of that, the problems remain only seemingly settled, and a very small thing, a discovery of some sort which is spread abroad, suffices to put them all into question again.

Fragile as often are the solutions accepted or proposed, they keep us from the nihilism which was the mistake of the historical school with respect to morals, as it seems to us, and from the moral nihilism of the new school which claims simply to substitute a practical moral art for ethics. There are differences from the point of view of value in the solutions proposed; some things are absolutely false and inadmissible as not responding to the actual fact,[97] and the first of them is that mental nihilism thus expressed by an ingenious writer, "If the world agreed with our philosophy, the world would stop." Our postulate is that the world should advance, and we are not afraid to affirm it without giving any reasons; the chain of our reasoning must start from an undemonstrated postulate.[98]

§ 224. *The Quest of Universality; a Criticism of Tarde.* There are truths which tend towards universality, but which are hemmed in, limited by obstacles, just as the

[96] There are many unfortunates so absorbed in the life of every day, that they have no time to think, so to speak. They are neuters, and as such should be as well treated as possible. They are the eternal conquered.

[97] By applying this idea, I would in part settle the question as to whether rulers may violate the law or whether, if they do, they should in fact or in law, be punished. The affirmative is certainly true when a potentate has acted for his own good pleasure, or his object was private gain. But the situation is different, whatever be the final decision, when he has acted to further a major social interest and has preferred to lose sight of principles rather than to lose colonies. Then there is among other problems that very disturbing one of the Reason of State. [raison d'État]. Anent these violations see, contra, *E. Faguet*, "En Lisant Nietzsche," p. 333.

[98] Observe that *Courcelles-Seneuil*, op. cit. p. 378, has no less distinctly asserted that all ethical principles are unproved.

cells in a honeycomb are modified in form and extent by neighboring cells. But where should this limit be, how shall we effect that combination of human purposes which Jhering so properly demands?[99] This problem, which is equally one for law and ethics, is the most troublesome existing. Legal and moral casuistry has worked on it for centuries, for it has presented the most baffling of difficulties. Most frequently the solutions suggested are all bad, as we can see from the fact that the struggle between the opposing ideas is almost always complex. We cannot agree with Tarde[100] that, in regard to all the elementary facts of social life, the opinions and plans are always only two, that if in a battle there are armies of different nations there are only two sides, and that every quarrel reduces itself to a yes and a no. Though this may practically appear as inevitable, it does not mean that the manifold of ideas which enter strife consequently have only two simple solutions. While the facts may sometimes have this appearance, the warring conceptions rather resemble a crowd trying to pass through a narrow passage where the struggles between various individuals are but incidents of a more general conflict. If we affirm the contrary, we are only obeying a mental tendency towards simplification, even to the extent of mutilating and changing facts; we are following our inclinations rather than reality.

Since it all seems so complex, since different truths are so hard, so often impossible, to measure by any common standard,[101] since even an approximate standard, if discovered, is so hesitatingly applied, we can easily understand why it is so dubious an undertaking to venture into such a field, and why Montesquieu himself did

[99] "Law as a Means to an End," § 5, pp. 43ff.

[100] Op. cit. p. 168.

[101] See *Bentham*, "The Principles of the Civil Code," for a comparative notation for these values.

not dare to try it, preferring to determine the consequences of various principles of government without comparing their merit.[102] For we understand why elaborations of general ideas having so fragile a basis pass soon out of date. Let us repeat, however, that the difficulty, to put it no more strongly, does not suppress the problem.

§ 225. *Ideal Law has Ideas of General Validity.* In the midst of these uncertainties, we must, however, call attention to some points which seem beyond discussion, and which, to a certain degree, will guide the legislator and the jurisconsult. There are the general ideas on the object of life which constitute the necessary basis of law, and which, although their proof is uncertain, are at least supported by the opinions of a great many men. Then there is the consideration that, as law is made for man, it will better answer its purpose if, as the idea of happiness becomes clearer, rules are proposed in harmony with the psychology of man in every period, or in a particular time or country or social rank, or occupation or profession — if more attention is paid to facts, even to every man's idea of happiness, right or wrong.

It is quite true that human life, wherever it occurs, has the same general, in spite of the diversity of its particular, characteristics. Human law, however complex in content, inevitably shows certain general characteristics. There is a generality which results from the action of general conditions.[103] Among others, there is the principle that law should be based on a general interest, that of being to every one's advantage (of being just, if you like, as the term is so vague that it binds

[102] Compare *Charmont*, "La Renaissance du Droit Naturel," p. 35 [not translated in this volume].

[103] In this sense see *Korkunov*, "General Theory of Law," § 14.

us to nothing), otherwise it would be unacceptable and unaccepted.[104] This must be admitted, and it shows that even such a man as Nietzsche drew must expect to encounter an adversary as redoubtable as, perhaps more redoubtable than, himself, and, in consequence, must take care to treat gently, to a certain degree, the interests of his future rival.

There is, in addition, a vast array of solutions which may be classed as truths of various degrees and which may be conflicting one with another. Let us emphasize this point, which needs explanation.

Men have always hoped to get a system which could not be contradicted, a sentiment which explains the deep concern into which modern opinion was thrown by the brilliant studies of Nietzsche on the Will to Power, in his attack on contemporary morals — slave morals, he said, which take from a man "his noblest love of himself, and the strength to guard himself." It is perceived that this theory, eminently dangerous because of the possibility of its misapplication, was, nevertheless, that dominating great acts of public policy, and that it made it necessary to offer contradictory moralities a modus vivendi. This necessity is real, for the practical legal and moral art must have as its special province the setting of a limit to opposing conceptions. Thus it is necessary to bring into harmonious relation, on one hand, the morality of the governing elements which subordinates everything to a certain consideration of public interest and admits in part the reason of State [la raison d'État], and on the other the morality of simple citizens very respectful of the rights of individuals. Evidently, checks will be frequent in this work, for, as we have seen, certain theories aspire to universality and cannot easily be held within their proper limits.

[104] *Renan*, "Dialogues Philosophiques," p. 44.

The attempt should, however, be made, even if it succeeds but ill, for it is the consequence of this first postulate — we must live, that is, affirm or deny certain things.

Therefore, if it seems to us certain that there is above us a natural law, an ideal law with variable content,[105] it seems also to be very hard to discover,[106] as we have to explain something to which we hardly have access. For it would be naïve to consider as a criterium of truth either a nearly general agreement in a principle, or its antiquity. The paradox of to-day is often, though not always, the truth of to-morrow.

The ideal would doubtless be, as Tarde says, that each distinct science, like modern astronomy, be reducible to a single formula, and that there be, as a bond between these different formulas, a higher formula — that, in a word, there be no more sciences, but only Science.[107] We are as yet far from this ideal.

§ 226. *The Never-Ending Struggle of Motives Forces us to Deal Empirically with Ideal Law.* In this state of affairs, what results? Law can only be satisfactory on the condition of responding not only to every one's real needs, or objective advantage, but also to what he thinks of as his tastes.[108] Like the wife of Sganarelle, certain people like to be beaten, as others enjoy "licking the policeman," even if they have to pay for it. Sages will say in vain that this is absurd, that we should have other tastes; it is the fact, and unlike Royer-Collard, there is nothing in the world which I hold in as much

[105] Compare, in the same sense, *Charmont*, op. cit. p. 217 [§ 103 in this volume].

[106] Perhaps the mistake of Positivism, after affirming the existence of the unknowable, was to believe that there are no practical consequences to be drawn from this fact. Cf. *Tarde*, "L'Opposition Universelle, p. 276.

[107] "Lois de l'Imitation," p. 193.

[108] *Courcelles-Seneuil*, "Préparation à l'Étude du Droit," appendix iii, p. 396, has already indicated this idea.

esteem as a fact, the more so if it be important. Nevertheless, are there not cases of people who must be helped in spite of themselves; when a nation has tastes which are leading it to its fall, must they not be blocked?

The ideal law which legislators and judges are asked to put into force will necessarily be imperfect, for if a conception which is believed to be good is imposed on every one, no matter whether it be that of the majority or of the minority, some sentiments, some tastes will be offended. Even if these are exceptional, they are respectable to a certain degree, and why in general should people be benefitted against their wills? It will be said that the State is inspired by an objective utility. So it is believed at the time, but may not the utility later appear to have been an illusion? For centuries the State believed that its duty was to maintain slavery; for no less a period it believed that it was of the first importance to uphold the unity of religion. Torture was once looked upon as an essential instrument in the discovery of truth. Errors of the past are easy to point out; will not ours be shown in the future?

Or the State says, "My word is law." Such arbitrary action is exactly as just or as unjust, depending on the point of view of the observer, as a State religion or an official school of art. The consequences are the same.

Or, shall the organized forces assure to each individual the freedom to apply his own theories, to follow his own tastes, religious or atheistical, egoistic or charitable, artistic or scientific? This would be a convenient system which would satisfy everybody, unless there occur among the various theories in presence what I will call systems of authority, that is, such as impose one requirement on everybody. How can every one be certain of having what he wants in the question of trade-unions? Some are partisans of obligatory membership, others of revo-

lutionary prohibition of the right to form occupational groups. The result will always be that for some too much is allowed, for others too little; and universal liberty, toleration, neutrality, whatever people may wish, is an opinion just like another. If it is a better, it is not because it can satisfy everybody, nor because in and by itself it is ideal. Liberty is in truth objectively nothing but a doctrine of despair; powerless to do better, the State allows every one to accomplish within a certain sphere what he thinks best for himself and others. Subjectively, it is a necessarily insufficient tolerance, for it cannot fully content the partisans of absolutist doctrines. Thus the problem is at least in part scientifically insoluble.

Solutions satisfactory to one cannot help violating the desires of another, so we are forced to use empirical methods[109]: to weaken opposition by creating a public spirit in various ways such as by watching publications or schools[110]; the end is hidden, the proposed solutions are toned down; little by little they are carried.[111] This is politics with its ruses and its methods that are so often called immoral.

It is probable that this struggle will never end. Humanity will always seek something other than that which it has. Institutions, accepted for a moment, pass out of fashion, men will put aside what appear to be even the best of them. Abuses will throw into relief their bad sides, the good will be less in view, so that if a modification does not come by legal means there will be an attempt at a change by violence, which many people will approve if it succeed.

[109] Thus is established a bond between law and politics, and we may say with *Jhering*, "Law is the well understood policy [Politik] of power."

[110] Compare *Courcelles-Seneuil*, "Préparation a l'Étude du Droit," p. 96.

[111] Compare *Dicey*, "Law and Public Opinion in England," opening pages.

§ 227. *Our Postulate of an Ideal Law for Each State of Society.* Nevertheless, we do not deny the existence of an ideal law. I would even say a law of nature, except that that expression denotes a discarded theory which was the basis of an attempted ideal system of law good everywhere and always. A legislative ideal would seem to exist for each social state, that is, a state of law better than any other or at least states of law better than others. At least this is a postulate which we must set up if we desire a reason for our studies.

Only, and this is the new point on which I insist, this ideal state of law in the presence of certain social facts, historical, economic, and other, will be always imperfect, for law is created to respond to actual needs, whose relative importance is hard to establish, and also to respond to every one's taste. Actual needs are determined by social science, unfortunately still in embryo; tastes by many elements, the extent of which is hardly defined, by age, race, temperament (whether sanguine or lymphatic), heredity, imitation, and many unknown causes. Tastes must, however, be taken into consideration; for example, is not the taste of certain persons for this or that artistic manifestation the explanation of a whole body of laws on historical monuments which other persons think unreasonable? Law, being created in every one's interest, that is, in the general interest, which is only the sum of the interests of individuals, must take into account such interests, both as they objectively are and as they seem to be. Ideal law appears, then, as the final and common result of social science and of the aspirations of humanity. It will appear at once objective and subjective — objective in its purpose, general utility, but subjective as looking to the satisfaction of human tastes, to the realization of varied conceptions of life.

This will be possible only for very short periods, and very imperfectly, through a relative and momentary union of mind, just as the garden of Versailles, that living contradiction of nature, can only be kept from a return to their natural wildness by incessant efforts of the gardeners.

§ 228. *Can Actual Law Satisfy the Mind?* Let us leave these necessary theoretical studies for actual life. Law as developed in practice, in positive systems of law and their application, cannot always satisfy the mind, for it frequently appears as an intelligent combination of force and ruse much more redoubtable than that brutal force against whose triumphs philosophers so loudly declaim.

Purely ideal law, responding to an objectively viewed general utility, and to individual conceptions of life, is so rare, so hard to reach, that we can only infrequently even think of attaining it.

Nevertheless, we should not totally despair. Hope is a necessity of the spirit, just as sleep or digestion are necessities of the body. Objectively, besides, we think that there is something more worth doing than merely chronicling the triumph of organized forces. We should try to see, through the veil of subjective self, with passion eliminated, on which side is the greatest objective good in the existing social state. We should try, too, to accommodate ourselves to the ideas of the present, and never forget, while we are building up this law at once objective and subjective (in the sense we have already given to these expressions), that we are never sure of attaining objective truth. How many beliefs well established at a given time are to-day discredited; how many discussions are embarrassed by the ruins of systems and of theories!

We must remember, too, that law as a means of advancing in the highest and widest sense the general interest, which is, finally, the interest of each individual, really acts to a certain degree against its own object when it is compelled to use force to compel obedience, or has to cause suffering.

Because of all these circumstances we must be hesitating in our statements and in many cases we must confess the weakness of our science. Is it not, however, more scientific to refuse to pronounce judgment and to be content to fix the limits of the known than to pretend to govern the universe with one or two principles?

Did not Pascal, while laying so much weight upon justice, show how great a risk is run in attaining it, and how much importance man should give to custom in the lack of something better? "What is the foundation stone of society? . . . Justice it does not know, for surely if it did, it would never have established this maxim, the most widely spread of all among men, 'Let each man follow the custom of his own country.' . . . As a result of this confusion one says that the essence of justice is the authority of the legislator, another the convenience of the sovereign, another prevailing custom, and this last is the best. Nothing is just in itself through reason alone. Everything changes in time." [112] A little further he adds: "Just as fashion creates grace, it creates justice." [113]

At the same time he saw the difficulty of seeing justice as anything but appearance. "Nothing is so faulty as the laws which repair faults. Any one who obeys them because they are just, obeys his own idea of justice, but not the essence of the law." He ended by admitting that variable postulates must be set up. "A man who

[112] "Pensées," Brunschvicg ed., fragm. 294.

[113] Ibid., fragm. 209.

cares to study the reason for a law, will find it so weak and so slight that if he is not accustomed to contemplate the prodigy of human imagination, he will wonder that the lapse of a century has endowed it with so much pomp and reverence."

§ 229. *The Tentative Basis of Ideal Law.* The establishment of an ideal law seems possible so far as there are material needs to be satisfied, subject to the question whether this law ought not to vary its procedure in different epochs and in different places, and whether, in the event of highly skillful care for material needs, perfection would not be reached to the detriment of certain higher ideals.

Further than that, ideal law is, in theory, hard to build up, as much for objective as for subjective reasons. The latter are grouped about a first postulate, duty; it is every man's duty to work for the good of all. This we believe to be true, although very few people do their duty as so understood. It is, however, one of the primary ideas which positive science, at least, does not explain for us,[114] but which must needs be fearlessly affirmed. Moreover, there is no use of a discussion with any one who does not believe in duty, because there is then no field for controversy. This difficulty also presents itself with regard to our first affirmation, that of the existence of an ideal law; it cannot be proved. The construction of this higher law, in the face of this primary difficulty of reposing on a postulate, involves other very serious difficulties, of which two in particular may be named.

First, the idea of social duty may be differently understood by different persons. The limit of duty is uncertain, and besides, its application is apt to give rise to endless difficulties, which are harder to settle than to discuss cleverly or even originally. To what extent

[114] See *Bourgeois*, "Solidarité," p. 73.

is an intellectual or æsthetic to be preferred to a material interest? How far must present be sacrificed to future interests? When there is what is called a general interest, which is most often, in the last analysis, nothing more than a bundle of individual interests very weak when taken separately, to what extent must the interest of one person be preferred to it?

There are, however, some approximate certainties. Certain solutions are thrown out by almost all theories; others are meeting places for lines of deduction from very different principles.

Secondly, we must call attention to the complications resulting from the subjective character which the ideal law should have. The principle of majority rule which holds sway in democracies should not bring with it oblivion to the proper interests of minorities. The interest of one innocent man is of more importance than that of the mob which clamors to have him declared guilty. It is always hazardous to do a man good against his own will, even though the advantage to him be certain. On the other hand it is impossible not to stop an individual who is rushing blindly to destruction; we should then conclude in favor of liberty conceived solely as a last shift. What individuals really have, in nearly all matters, are respectable interests rather than rights.

It is then probable that the world will continue to be buffeted about by theories all equally uncertain. It will obtain relative quiet from imitation and indifference, but one exterior circumstance will be enough to change everything.

§ 230. *The Limitations of Technic as a Recipe for Law.* What field is left for the study of law to cultivate away from those moving sands; what is its domain outside

of these troublesome questions on which men cannot make up their minds? There is at least one which is uncontested; technic, that is, skill in adapting means to determinate ends. In the arts, aside from the question what is Beauty — if a rational Beauty exists — there exists a vast realm of technic to be studied, for the adaptation of certain materials to certain effects.[115] Just so in law there exists a technic, of the use of the proper means to accomplish certain simple or complex purposes, with due respect for other provisionally acquired solutions; a technic in which Roman lawyers were marvelously successful. This art is capable of development,[116] and its advantage becomes the greater as it is applied to matters farther away from a direct influence on and less easily understood by the common opinion, such as the larger part of private law, and especially its theory of obligations. Establishing what are really formal principles, if I may so express myself, that is, combinations of rules which are instruments adaptable to very different ends, the juridical system of obligations can be changed only with wise deliberation in spite of its important indirect consequences. Here, however, by a sort of curious intellectual color-blindness, the mass of the public notices this effect less than elsewhere.

Progress in technic seems the more possible because inventions in its domain may accumulate almost in-

[115] In our opinion, there are nevertheless limits to this development. This idea *Tarde* adopts by implication. "True invention, invention which deserves the name, becomes more difficult every day. . . . It will finally be exhausted, for no people has capacity for unlimited mental development. Consequently every civilization, European, Asiatic, or or any other, is fated ultimately to reach its limit and begin turning in an endless circle. But we are yet far from this point." Op. cit. p. 130.

[116] There is this curious analogy between the arts and law: that in both kinds of study, an almost indefinite improvement in technic seems possible, while a satisfactory definition of beauty seems no more probable than one of ideal law.

definitely. In the domain of directory principles, on the other hand, ideas cannot easily accumulate, but most often lend themselves to substitution; in adopting new ones, consequently, one risks falling into entirely erroneous solutions.

In spite of this, we must admit that [117] principle has a higher value than technic and that on the whole the law will appear particularly satisfactory at a time when the abstract principles which dominate it have established a universal empire over the minds of men. This happy coincidence in the opinions of a generation facilitates the elaboration of satisfactory practical solutions, for a technic, no matter how highly perfected, gives but mediocre results if it be not known for what end it should be put into operation. Almost incapable as we are of establishing scientifically the essential principles of law and the hierarchy of needs to be satisfied, we should consider it a happy chance when, if only temporarily and between two crises, a general opinion is established on these points.

I say temporarily, for these happy coincidences are not long continued. As Tarde says: "Though the idea of repetition rules the universe, it is not the universe, for at bottom lies a certain sum of innate, eternal, indestructible variety, without which the world would be as flat as it is immense. John Stuart Mill was led by his reflections to a similar postulate." [118]

Though this rôle that technic plays in the accumulation of new discoveries seems important, it is not for that reason easy to play in a civilization already old. Life in society, as has been observed,[119] ends inexorably in the formation of an etiquette, that is, in a complete

[117] See *Tarde*, "Lois de l'Imitation," pp. 195ff.

[118] Ibid., p. 413

[119] Ibid., p. 206.

triumph of conformity to rule over individual fantasy. Happily, however, the very complications which arise from this development make it possible to make room for new inventions, for ideas different from the old, as happened, for instance, when the Roman law admitted the "jus gentium."

§ 231. *The Principle of Mass Action.* The second rule which must be followed by those who study the law and seek to assure its domination, is that the human mind being such as it is, principles of action alone have any hold on it. When men are asked to act not "ut singuli" but in a mass, whether as a mob, as public opinion, as voters, even as members of a certain social sphere, or of a group — a labor union, a partnership — they only grasp easily simple ideas, like liberty, social solidarity, or justice. When jurists, then, wish to translate their conceptions into realities, they must appeal to these simple ideas; the work which has action in view is not of the same nature as that which has in view the discovery of truth. "Nothing being more natural to the individual human being than reason, nothing being as satisfying to the reasoning faculty of an individual as a symmetrical logical order substituted for the mysterious complications of life," [120] practice should bend to exigencies, and at times when rationalism rules, and also individualism and fashion imitation, it will find a field marvelously prepared for ideas thus presented.

The practical work thus accomplished will be useful. As Herbert Spencer says: "An ideal, far in advance of practicability though it may be, in always needful, for right guidance. If amid all these compromises which the safety of the times necessitates, or are thought to necessitate, there exist no true conceptions of better or worse in

[120] Ibid., p. 369.

social organizations — if nothing beyond the exigencies of the moment are attended to and the approximately best is habitually identified with the ultimately best — there cannot be any true progress." [121] In what shall this ideal consist if not in simple principles? These simple ideas, worked out with a view to action, may be in part scientifically exact, and in part uncertain, as we have already seen. Nothing is more dangerous than for them to be followed to their extreme consequences; in such cases appear the terrors of a great idea in small brains.

§ 232. *Justice and Social Evolution.* For this reason we are a trifle, but only a trifle, suspicious of the seductive principle established by our eminent master, Saleilles, whose ideas on this subject we cannot, to our regret, adopt: that of taking as the type of justice that accepted in one's own time.[122] We fear that a ruling principle will be pushed to an excess if it is too widely applied; there is nothing more apt to bring on revolution or reaction than the persistent logical application of a single principle.[123] Perhaps nations which desire a long life should preserve themselves in particular from pushing their ideals too far; the risk of a catastrophe would be great. Thus the arts have fallen into decadence in all countries through the exaggeration of certain principles which had contributed to their glory, and which worked their destruction in the name of manner or style. In consequence, opinion tires of and

[121] "The Man versus the State," combined with "Social Statics" (Appleton, 1899), p. 417.

[122] See also, on the importance to be assigned to the collective thought, *E. Lévy*, "Exercice du Droit Collectif," in RDC 1903, pp. 102, 104.

[123] See on this point the very successful study of *Meynial*, "La Logique dans la Formation du Droit," in RMM 1908, pp. 181, 186. See also *Jhering*, "Études Complémentaires de l'Ésprit du Droit Romain," pp. 388-9. [For the latter work, a French edition of *Jhering's* miscellaneous writings translated by De Meulenaere, see "Law as a Means to an End," in this Series, p. 455, footnote.— ED.]

becomes disgusted with institutions which have for a long time applied the same principles and have pushed them to their last consequences.[124] It is to be hoped, then, that these extreme situations will not too often occur; but it is proper to remark that, according to the old saying of Horace, there are limits beyond which cannot be found the good and the just. This is a point which must not here be forgotten.

Justice being thus a thing of compromise and arrangement, humanity will always be subject, at certain times, to outbursts of horror at its complexity, at these ambiguous situations; thence come, at times, those revolutionary paroxysms to which nations are subject, which lead them to simple and extreme solutions, but do not restrain them from making shortly afterward new attempts in the system of compromises and of composite solutions.

I do not, therefore, believe that all these similar or dissimilar lines of social evolution will end in a stable, mobile equilibrium.[125] Such equilibrium, even if its center of gravity is changing slowly, may be destroyed all at once. This has happened more than once in the past, and, as we must conclude, will happen in the future. It is true that immediately after a catastrophe of this sort the process of evolution begins over again, heading toward another apparent equilibrium; but I believe that the tangled threads of the evolutionary processes are more complex than one is likely to have any conception of.

I do not mean, however, that we may not hope to find the oppositions which we have observed, ultimately, a form of adaptation, or its prelude — that we may not

[124] Compare *Hauriou*, "La Science Sociale Traditionnelle," p. 23 (on the production of crises).

[125] To the contrary, *Tarde*, "Opposition Universelle," p. 332.

hope at least to lessen the opposition, or even to do away with it or to change it into a higher collaboration. Such is our hope, a principle of action which we *will* not reject. It is axiomatic that action is superior to the static state, as being is superior to non-being.

§ 233. *"Principles of Law" Sanctioned by their Dynamic Value.* Thus we restore their proper place to "the principles of law." They are principles of action which are insisted on in order to induce action along certain lines; they must be accepted and recommended because of their dynamic value. It is, however, extremely dangerous to abuse them by pushing them to extremes; one ruling principle would then cause the rejection of another equally reasonable.[126] Understanding this, we can assign their proper place to the principles of traditional morals, which dominate at once the law and such ideas as justice and respect for our neighbor. In part these are true principles, but their opposites are also partly true; they all represent general tendencies.[127] However, as the principles of morals are in contradiction with certain very strong human tendencies — the desire for pleasure, to follow only one's appetites, not to exercise self-control — they need to be specially affirmed and to be kept up to a certain level through the means used for the spread of ideas.[128] It must be continually repeated that a man should not injure another, although in certain cases he must do so to accomplish a greater good (the rule of necessity), because the second tendency is easier to follow. Thus we can reach that

[126] Compare *Cruet*, "La Vie du Droit," p. 191; *Picard*, "Le Droit Pur," p. 339.

[127] *Paulhan*, "La Logique de la Contradiction," RP 1910, p. 294.

[128] This seems to us the more essential because, as we consider certain classes of society, we are far from sharing *Renan's* optimism. He says: "One thing is certain, that humanity will draw from within itself all the illusions needed to cause it to do its duty and to accomplish its destiny." "Dialogues Philosophiques," preface, p. xix.

middle ground which is all that we can hope for in this world.[129]

Perhaps we shall be reproached for not having, in consequence of these principles, established some theory, some principle which should dominate the whole law. But that would be only laying down principles of action, and we have just expressed ourselves as to their value. We prefer solely an exposition of the sad scientific truth in this work of pure science.

§ 234. *The Opposition of Desire and Belief.* From this necessity for action, comes one of the contradictions which confront us at every step. As action presupposes a simple principle which one is forced to inculcate, as political strife presupposes war cries at the same time right and wrong, to call together partisans for the fray, it is in practice usually necessary to represent morality, always a little different for different individuals, as simple and universally the same, in order to facilitate the establishment of its empire. This is also why one is sometimes forced to represent public policy and the system of law, which are essentially variable, as outside the field of morals.[130] To strengthen the domination of moral principles in men's minds, they are represented as sacred, as a reigning queen, who governs, however, only incompletely. The object is praiseworthy. But in fact we are in a realm in which what is moral cannot always be clearly affirmed. Those interested do not always see clearly where the good is; sometimes, indeed, the good is indiscernible. This does not mean, however, that here no morality exists, but only that, for reasons of prudence, it is undesirable to lead it astray.

[129] This is an important agent of progress, a point very clearly made by *Hauriou*, op. cit. pp. 206ff.

[130] See in agreement, *Faguet*, "En Lisant Nietzsche," p. 335.

Action and science are in eternal opposition. The needs of the spirit and real life, such is the pitiful circle in which humanity will always travel! It is a source of numberless contradictions, and will always cause laughter in the superficial who think everything can be settled by logic. If they were right, thinkers of every type would be authorized to demand reforms and innovations in the name of logic.

However, as Tarde said: "We must first of all seek out, define, and establish the limits of the true oppositions of desires and beliefs; we must observe the conditions in which they occur, what are their various classes, and finally their known causes, if we are to act effectively on them." [131] We do not hope to accomplish such a program, but we can at least indicate certain of its main lines.

§ 235. *Practical Realization of Ideal Law; Coercion.* Up to this point we have treated of the bases of law, and incidentally we have had to touch somewhat upon those of morals. But we have not taken into account one point of the first importance, the question of practical realization. We have set up a social ideal, but who will guarantee that man will conform to it? Some will, because of the tendencies of their characters, of education, of heredity; but why should all the various elements of humanity unite on our ideal? How shall we obtain the sacrifice of the individual will to the non-ego? [132]

Izoulet, in his "La Cité Moderne," esteems that it is enough to enlighten every one, to show him that the interest of the community is his interest, that he cannot be rich or happy unless society is also rich and happy.

[131] "Opposition Universelle," p. 436.

[132] See on the importance of the sacrifice, and on the character of this sacrifice to similitudes, *Hauriou*, op. cit. p. 181.

This is to reason as if each man were eternal, and is founded on that profound illusion which takes a part for the whole. For the act which profits society profits the individual but little; the act which profits greatly the individual and harms society, only injures the individual very slightly. Have there not always and everywhere been individual contractors who have robbed the State or tried to rob it, believing that their interest lay rather in promoting the common evil than in remaining honest? [133] Doubtless, such acts, if continued, injure everybody, spread suspicion and corruption from which all suffer. All this, however, comes later, and if he who was the cause of this corruption is dead, and if he only had his personal interests in view during his life, he has lived happy enough. The notion of duration, and of long duration, is therefore necessary for the conception of a private as strongly identified with a public interest.[134] It is the essential basis of morals and law, whether one thinks only of the earthly existence of the individual and of his family or conceives of the eternal beyond worldly things. Without it morality has no practical sanction for most men.

Only as the result of a highly intelligent interest, then, will an individual bend to the interests of society, either in small things or in the greatest of all, the sacrifice of life itself. In many cases, at least, for we must not exaggerate, such sacrifices can only be the result of a sort of hypnotic influence having in view a definite object, exercised by education, by exhortation of many kinds,

[133] Compare *Jhering*, "Law as a Means to an End" (in this Series), on the hope that though we violate the law others will respect it (French ed. p. 304). [This and the other references hereafter made by M. Demogue to the "Zweck im Recht" are to the French translation by De Meulenaere. For the works of *Jhering* issued in France see "Law as a Means to an End," p. 455, footnote.— ED.]

[134] This is what *Jhering* says in defining law as the coalition of the foresighted against those who are not foresighted ("Zweck im Recht," French ed. p. 375).

that exerted by the newspapers, by example, by governmental authority and so on; in a word, as a result of a faith which displaces the center of gravity of pleasure, which carries a man out of himself, which makes him a sort of machine, or trained animal. Faith, in this connection, does not necessarily have anything to do with religion. Thus we have the realization of morality, dependent on belief, in the general sense of the term, on a certain fixity of mind, on habit, on imitation — a realization consequently somewhat precarious.[135]

Consequently, it becomes necessary for the most important principles to be enforced by coercion, itself a dubious support, for it is not always possible to make a man act against his will. Coercion to this external defect joins an internal defect grave enough in itself; it depends on the strength of the social ideal in the man who is making use of it; so the sovereignty of law, as well as that of morals, is ever a weak thing.[136]

§ 236. *The Complexity of the Subject About to be Analyzed Thus Apparent.* We have shown the complexity of the problem; we shall now proceed to break it up into its elements, and to examine the principal tendencies which dominate private law, so that we may know how far they are in accord, how far in conflict. We shall then show that the rules of law to be established, if they are to present that coördination among themselves which is the peculiar quality of science, depend on an important point, the relative weight to be given to the principal tendencies which the legal system must take into account.

[135] The more so as he who solely seeks to realize the social ideal, runs the risk of being deceived by dishonest men (see *Charmont*, § 62 ante; "Renaissance du Droit Naturel," p. 146), and then the ideal is reduced to this desirable but not always possible compromise, to be just and yet not be duped. So the ideal of law is often unrealizable.

[136] The more so because law, in appealing to force, runs counter to its own object, if that be to satisfy every one, for it then admits its partial powerlessness.

CHAPTER XIII

SECURITY

IMPORTANCE OF THE IDEA OF SECURITY — OTHER INTERPRETATIONS OF SECURITY — THE INFLUENCE OF THE IDEA SHOWN IN THE PROVISIONS OF PRIVATE LAW — HOW PRIVATE LAW SECURES RIGHTS FROM ATTACK BY THIRD PARTIES — BURDEN OF PROOF — UNDERLYING MOST OF THESE CONCEPTIONS OF PRIVATE LAW IS THE AIM OF FACILITATING TRANSACTIONS: DYNAMIC SECURITY — STATIC SECURITY THE COUNTERPART OF THE FOREGOING — THE PROBLEM ARISING FROM THE OPPOSITION — A RECONCILIATION POSSIBLE? — MEANS OF MITIGATING THE CONFLICT: (1) INSURANCE; (2) PUBLICITY — OTHER MEANS OF SETTLING THE CONFLICT: (1) IN CASE OF BAD FAITH; (2) WHERE THE PARTIES ARE IN GOOD FAITH, LIABILITY FOR FAULT — SECURITY VIEWED IN A DIFFERENT LIGHT: AS A SENTIMENT — THE SENTIMENT OF FALSE SECURITY — THE MODERN SOCIAL CONCEPTION OF THE POSITION TO BE SECURED TO THE PROPERTYLESS — PSYCHOLOGICAL CONSIDERATIONS: (1) DYNAMIC SECURITY; (2) STATIC SECURITY — COMBINING THE TWO FORMS — PERFECT SECURITY UNATTAINABLE AND UNDESIRABLE.

§ 237. *Importance of the Idea of Security.* We touch here the most important of the desiderata of social and legal life, its central motor, the need for security.[1]

[1] In assigning such importance to security, I do not believe that I exaggerate. Many writers base law on the idea of order, which is the most direct generator of security. *Berolzheimer*, op. cit., vol. iv, p. 113;

This is one of the interests which have principally preoccupied modern law-making. This idea of providing for the security of individuals, simple as it is, has a colossal importance in the law of our days. It is at the base of very important principles with respect to the sources of law, whether public or private law.

John Stuart Mill did not exaggerate when he said:

"Security no human being can possibly do without; on it we depend for all our immunity from evil, and for the whole value of all and every good, beyond the passing moment; since nothing but the gratification of the instant could be of any worth to us, if we could be deprived of everything the next instant by whoever was momentarily stronger than ourselves." [2]

Is not security at the base of respect for all theories, all principles, as it is at the base of the need for religious faith?

Mill understood perfectly the bond linking this idea with that of absolute unlimited rights, with that sort of free zone, recognized by everybody, which is the basis of individualism, and in particular of the Declaration of the Rights of Man. This he expresses:

"This most indispensable of all necessaries, after physical nutriment, cannot be had, unless the machinery for providing it is kept unintermittedly in active play. Our notion, therefore, of the claim we have on our fellow creatures to join in making safe for us the very groundwork of our existence, gathers feelings round it so much more intense than those conceived in any of the more common cases of utility that the difference in degree (as is often the case in psychology) becomes a real difference in kind. *The claim assumes that character of absoluteness, that apparent infinity, and incommensurability* with all other considerations, which constitute the dis-

and this writer speaks elsewhere (p. 89) of law as an ordaining force. We are here touching on one of the most characteristic ideas of human reason (see *Montré*, "Cournot et la Reconnaissance de Probabilisme au XIXe Siècle," pp. 211ff.); it is not astonishing, then, that it should have a large place in the law, so closely allied to psychology.

[2] *John Stuart Mill*, "Utilitarianism," 8th ed., p. 81.

tinction between right and wrong and that of ordinary expediency and inexpediency. The feelings concerned are so powerful, and we count so confidently on finding a responsive feeling in others (all being alike interested), that *ought* and *should* grow into *must*, and recognized indispensability becomes a moral necessity, analogous to physical, and often not inferior to it in binding force."[3]

Jhering has likewise proclaimed with much sense the importance of the security of rights from the moral and economic point of view, showing that neither wealth nor character can develop where the feeling of this security does not exist.[4]

Do not the tendencies towards the replacement of custom, which is often uncertain, by statutes, towards systematic codification, proceed chiefly from the desire to guarantee security to everybody? The great principle of the non-retroactivity of laws rests on the same ground, as does also the effort towards uniformity of legislation, internally and even internationally, in spite of the certain defects of such uniformity.[5] The security of business transactions is desired above everything else, and can only be attained through the simplicity (indeed relative) which comes from one rule everywhere applicable. Security is the cornerstone of the great principles of the drafting of laws enunciated by Montesquieu: a style at once concise and simple, not lending itself to several meanings without subtlety, more concerned with presumptions of the law than of man, not redundant.[6] To it again is due that precision

[3] Ibid. at same page.

[4] "Law as a Means to an End," in this Series ("Zweck im Recht," French ed. p. 255). See also, on the importance of security, *Bentham*, "Principles of the Civil Code" [French ed.], part i, ch. vii. Is it not this need for security which makes a light word a sort of sacrilege in a book dealing with law, and which accounts for the gravity characteristic of everything that concerns Justice?

[5] See *Montesquieu*, "Esprit des Lois," livre 29, ch. 18.

[6] Ibid., livre 29, ch. 16.

which some authors look upon as the special characteristic of law.[7]

Moreover, believing that security is the only principle, certain persons see in it the essence of law, which, for them, is contained wholly in that idea of stability dear to the individualist school.[8] In their opinion the State, charged with the duty of assuring the reign of law, should limit itself in order better to accomplish this task. It should be strong, but as it cannot know and do everything, it should satisfy itself by assuring stability.[9]

It is essentially for the same reason that the highest courts try to give fixity to their judicial decisions; otherwise there would be only a weak security, as any more or less doubtful question might be decided in one or the other way on the hazard of the moment. Security is also the strongest argument for the logical and unvarying interpretation of written law. If the interpretation of statutes changes with the times, and has to respond to objective considerations often somewhat vague, a man can never know on what to count.[10]

§ 238. *Other Interpretations of Security.* So we come logically to the development of that juridical spirit so finely analyzed by Édouard Lambert, which seeks to harmonize the decisions of official authorities, to make them meet.[11] To safeguard security in legal relations, the routine of deductive interpretation is admitted. It must be known in advance what the judges will decide about a contract, so that if a new statute super-

[7] See *Morelli*, "Que Cosa sona le Liberta Civile," *Archivio Giuridico*, 1899, i, p. 52.

[8] See *Schatz*, "L'Individualisme Économique et Sociale," p. 320, and authors cited on p. 319 (*Hume* and *Courcelles-Seneuil*); see also p. 208 for the ideas of *Dunoyer*.

[9] Ibid. p. 208.

[10] Ibid. p. 319.

[11] "La Fonction Dynamique de la Jurisprudence et l'Interprétation Sociale du Droit," *Revue Générale de Droit* 1904, pp. 166ff., 451ff.

venes it will not throw the legal system into disorder, it will have no retroactive effect. Security would no longer exist if the legal system had lacunæ or could vary of its own accord.

Hence also came the hostility and dislike so long shown by jurisconsults towards custom, the most inexact form of law.[12]

In the idea of security is involved not only the stability of law but rapidity in its procedure; a right delayed in its exercise is a right impaired.[13]

In public law, does not liberty exist largely because it gives security to individuals in doing wnat they want to do? The legislators of 1789, inspired by this idea,

[12] See *Esmein*, "Rapport à la Commission de Revision du Code Civil sur la Coutume." Compare *Schatz*, op. cit. pp. 319ff., on the historical school.

[13] Some fundamental technical solutions also, those which concern the existence of subjective rights, are perhaps concerned with the idea of security. *Comte* wrote that "the notion of right should disappear from the domain of philosophy; . . . Positivism admits only duties, for from its social point of view it cannot consider any notion of right always founded on individuality" ("Catéchisme Positiviste," p. 288). After him *Duguit* has denied the existence of subjective rights belonging to individuals, as resting on the postulate of the existence of certain wills supposed to be, as such, superior to others, and of a peculiar nature. Perhaps this criticism is in itself not well founded, for it may be avoided by admitting that different wills may have a relative value in certain cases. True, this relative value is itself a postulate, but it may be just as necessary a postulate as that of solidarity, which the eminent author accepts without hesitation ("Droit Individuel, Droit Social," p. 8), and rightly, because every science rests on certain postulates, whether it will or no.

It is true, however, that if objective law be taken as a point of departure agreement is easier to bring about. *Tarde* noted, in this connection, that the law attacks social questions on their accessible side, by accounting all matters rights, that is, matters of agreement; and nothing answers that description better than the affirmation of an exterior rule to which everyone must bow.

But from the practical point of view, given the need of security, given the general desire for it in men's minds, what better meets the situation than to assert that everyone has rights? The individual should have rights because it is socially useful that he should. (See in this sense *Spencer*, "The Study of Sociology," French ed., p. 433.) The matter must thus be presented to him, as pure truths and principles of action are different things, which moreover are not easily to be reconciled.

were logically led by it to the Declaration of the Rights of Man. It is to this idea that we also owe the rule "nulla pœna sine lege," the suppression of arbitrary punishments, the guaranties given the defendant. At bottom it is the most solid basis of the democratic idea; for one of the chances one has of being well governed is that of participating oneself in the government.

Socially, it is the strongest support of the theory of liberalism in politics: to supply everybody with a certain zone of action in which he can freely move without being hampered by prohibitions or responsibilities. Every philosophy based on the "inviolability of the human person"[14] can have no better foundation than the sense of security with which it inspires everyone; for liberty does not always shine through its positive results, as it lends itself so easily to abuses.

From another point of view, that of public charity and of provision for the future, the interest of security is a solid argument in favor of State socialism; it leads naturally enough to the idea that everyone must have his bread assured in case of accident or sickness, and in old age.

§ 239. *The Influence of the Idea Shown in the Provisions of Private Law.* Limiting ourselves to private law, we see that security plays therein a no less important rôle. According to the most probable theory, contractual obligations come into existence from the moment in which one of the parties can count upon the adhesion of the other to his proposals. It is not proper that the hope he has conceived be deceived. This idea dominates notably the provisions of the Swiss Federal Code of Obligations (arts. 5ff.).[14a]

[14] See in this sense *Boistel*, "Philosophie du Droit," vol. i, p. 72.

[14a] [This enactment was not incorporated in the Swiss Civil Code of 1907 and is still in force. — Ed.]

This idea of security is the foundation stone of a whole series of formulated legal dispositions, which may be thus summed up: He who has treated with a person having every appearance of the ownership of a right should be protected. A reasonable appearance of the ownership of a right ought to produce the same effect as actual ownership of the right, so far as relations with third parties are concerned.[15] There are deduced from this rule the following consequences, which are either actually accepted, or which there is a tendency to accept, in law and in practical life.

The possessor of a movable is treated as the owner; in the case of movables, possession is equal to title (art. 2279, Civil Code).[16]

The possessor of an immovable is treated as the owner in the long run, through prescription (arts. 2262, 2265, Civil Code). In any case the fruits are his if he is in good faith (art. 549, Civil Code).

The apparent heir is treated as owner so far as his relations with third parties go.[17] "Error communis facit jus" (see decision of the Court of Cassation, January 26, 1897, Dalloz 1900.1.33).[18]

The holder of a negotiable instrument may sue all those whose signatures are upon it, who cannot avail themselves of defenses that would be available against his vendor.

The holder of an instrument payable to bearer should be treated as owner.

[15] See on these points, *Emm. Lévy*, "Capital et Travail, ou le Droit Repose sur des Croyances," in *Questions Pratiques de Législation Ouvrière*, 1909, p. 178 in particular.

[16] Compare art. 932, German Civil Code.

[17] See notably *Cremieu*, "De la Validité des Actes accomplis par l'Héritier Apparent," RDC 1910, p. 39.

[18] As to this maxim, see especially *Morin*, "À Propos de la Maxime 'Error communis facit jus,'" pp. 25ff.; *Soniewski*, "Essai sur le Rôle Actuel de la Maxime," thesis at Aix; *Valabrègue*, RCL 1890, pp. 30ff.

The owner of record should be held to be the owner so far as third persons are concerned (decision of the Court of Cassation, November 13, 1867, Sirey 1867.1.423).

An agent who has acted in excess of his powers may, as against third persons, bind his principal (see decision of Court of Cassation, October 23, 1905, Dalloz 1906.1.16).

An individual is entitled to compensation for impairments of his rights even regardless of the question of fault. This is as yet only a tendency, progress in which is marked by such doctrines as those of responsibility for the act of things, occupational risk, quasi-contract of neighborhood, responsibility for the act of animals, and so on.

The obligations assumed by an individual should be fixed not by his inner, secret thought, but by his open declaration.[19] Thus the German Civil Code declares that a declaration is valid though made with a secret reservation unknown to him to whom the declaration is made (art. 116) [20] or the purely apparent declaration whose real character is unknown to the third party (art. 117). In the same spirit, the German Civil Code admits that an offer binds him who has made it (art. 145).[21]

Acts of a corporation which are null, should be regularized as soon as possible.

§ 240. *How Private Law Secures Rights from Attack by Third Parties.* From the idea of security is derived the whole theory of the publicity necessary to assure the validity of a right as against a third person, a theory

[19] See on this most important theory: *Saleilles*, "La Déclaration de Volonté"; *Dereux*, "Étude des Diverses Conceptions Actuelles du Contrat," RCL 1901, p. 513; *Meynial*, "La Déclaration de Volonté," RDC 1902, p. 545; *Hauriou* and *De Bezin*, "La Déclaration de Volonté dans le Droit Administratif Français," RDC 1903, p. 543.

[20] See "Commentaire de la Traduction Officielle," vol. i, p. 121; *Saleilles*, op. cit.

[21] "Traduction Officielle," vol. i, pp. 165ff.

which may be thus expressed: a right may be set up as against all the world only so far as the public has been put in a position equivalent to notice by certain measures of publicity. This idea is applied to transfers of real estate by the very imperfect statute of 1855 on the recording of instruments, to gifts by article 939 of the Civil Code, to transfers of credits by article 1690 of the Civil Code, to transfers of patents by the Law of July 5, 1844, article 20, to marriage contracts which stipulate the marriage settlement by the Law of July 10, 1850, and to many other matters.

Mortgages are not valid as against third parties if they have not been recorded.

Formalism in its modern form,[22] no longer as in primitive times a way of materializing ideas, pursues the end of security. We are sure of being bound only if the proper form has been observed; and at the same time the extent of our engagement is made certain. For third parties, form is a veritable touchstone to show whether a certain juridical act has occurred.[23] The idea of security, also, in the form of simplification, which is its corollary, may go so far as to take account only of knowledge of an act through the formality of publication, refusing any effect to knowledge in fact.

§ 241. *Burden of Proof.* Still other consequences of the idea of security are the principles governing burden of proof. If we admit that the claimant should make his proof, if in consequence the presumption, till there is proof to the contrary, is that the state of facts conforms to the state of law, we contribute to the security of those in possession. "Beati possidentes."

[22] See on the renascence of formalism, *Gény*, "Livre du Centenaire du Code Civil," vol. ii, p. 993.

[23] See Chronique de Jurisprudence, RDC 1905, p. 895; *Campion;* "De la Connaissance Acquise par les Tiers d'un Transfert de Créance non Signifié," Lille thesis, 1909.

These principles have a limited bearing, but a great importance.

Let us be satisfied with these few examples, for otherwise we must review almost the whole of private law.

§ 242. *Underlying Most of these Conceptions of Private Law is the Aim of Facilitating Transactions — Dynamic Security.* All of the propositions which we have been formulating go back to a common idea of security, but almost all to security understood in a particular way, as we can now make clearer. Most of the rules which we have used as examples may be summed up in a sentence: the owner of a right loses all or part of the advantages which it bestows when this result seems useful in the interest of a third person who can reasonably have believed that such a right did not exist. Thus it suffices that a person believed or could believe that a right would be acquired, for the right to be set up. The shadow of a prey to be grasped is transformed, by a happy metamorphosis, into a genuine right.

Such is certainly the spirit of many of the solutions adopted by modern legal systems. The object of all these dispositions is the same, to make transactions easier. A man will evidently be induced to perform a juridical act to acquire a right, if he knows that, if certain things appear to be true, the result to him will be the same as if they were true. If I am sure that a certain declaration of will which has been made me will be taken as the basis of my right, I am more tranquil than if the secret will of the party making the declaration would govern. I will the more readily lend on mortgage if I know that only such mortgages as precede mine on the records have a prior right to mine in the realty. The security thus assured is a leaven of activity, a

bounty given to active individuals, which may be as important as a bounty on exported goods or on manufacture.

Passing to a neighboring order of ideas, my security increases my inclination to perform this or that act if I know that whatever may happen, the consequences can never be unfavorable to me, or at most but to a certain point. I will accept more readily a power of attorney, a deposit, if I am freed from any responsibility, or nearly so. I will take shares more readily in a company if my responsibility to the public as a shareholder is limited to my subscription. I will be more eager to buy if I know that I am guaranteed against ejectment or concealed defects. These solutions favorable to security are entirely in the spirit of western European law, dominated as it is by an ideal of business, by the idea that the object to be sought is to produce more, to manufacture more, to sell more, to multiply enjoyments, to satisfy more, and more varied, needs.

§ 243. *Static Security the Counterpart of the Foregoing.* But alongside this conception of security, which I would like to term *dynamic*, because it incites to action, there is another, its necessary counterpart, which it would be fair to call *static*. It may be translated by maxims which appear to bear the mark of evident truth: "Nemo dat quod non habet," "Quod nullum est nullum producit effectum," "One cannot be obliged against one's will." When a person is entitled to a right it should not be possible for him to be legally deprived of it by the act of a third person. If I own personalty, an obligation to bearer, for instance, ought I to lose it through a sale by my depositary? Ought my obligation to be determined by what appears to be my will rather than by my will itself? Should a company be bound in cases where there is a misuse of its

signature by one of its members; should the true heir be responsible for the acts of the apparent heir? If I have been injured, should I recover less than my loss? If I have a right, is it proper that my adversary defend on the ground that he did not know the law? Should I not triumph by invoking the maxim "Ignorance of the law excuses no one?"[24]

§ 244. *The Problem Arising from the Opposition.* These solutions are all open to criticism in themselves, and what is more important, in the name of the very principle of security. What rest can there be for him whose right may disappear the moment in which he least looked for such a loss to happen?

This opposition of static and dynamic at the base of everything has been observed and studied by philosophers. Did not Auguste Comte say that the great problem was to reconcile order and movement? The beliefs and the needs specified, and in that sense created, by invention and imitation, says Tarde, but which virtually preëxisted their action, have their roots deeper than the world of society, in the world of life. This latter, in its turn, draws its force from the physical world whose own forces have "their source, unfathomable for our physicists, in a hypophysical world, which some name Noumena, others Energy, others again the Unknowable. Energy is the most generally accepted name for the mystery. By this unique term is designated a reality which is seen to be always double in its manifestations; and this eternal bifurcation, which is reproduced in surprising metamorphoses at each of the superimposed stages of universal life, is not the least of the characteristics to be noted as common to all of

[24] Note, nevertheless, that this adage is not exclusively a consequence of static security, and that it is associated especially with the idea of giving absolute force to the law, as the organ of the general interest.

them. Under the different names of matter and movement, of organs and functions, of institutions and progress, this great distinction of static and dynamic, which includes that of space and time, divides the whole universe."[25]

This capital opposition is here clearly seen, and, from a social point of view, we are touching the heart of the problem: we see the idea of security turning against itself. Shall we prefer the security of owners of rights or of those who acquire them? At bottom the struggle is more inextricable than it seems, for the owner of to-day is the acquirer of yesterday. If article 2279 of the Civil Code favors me when I acquire an instrument to bearer, from one not the owner, it becomes a menace when I confide that instrument to a banker or depositary who may sell it. It is the eternal history of government installed by force, which, by that very fact, puts in the heads of its enemies the idea that a bold stroke may win power.

§ 245. *A Reconciliation Possible?* In a word, there is therefore an insoluble conflict between two conceptions of security. But though this conflict exists in theory, in practice it is not apparent to the short-sighted vision of the average man. This purely subjective security due to ignorance and forgetfulness of danger is, nevertheless, strong enough to be a force. An error as well as a truth may constitute a force-idea. One deals very lightly in the acquisition of personal property, without thinking of the danger which he will run as owner. It cannot, however, be denied that the subjective security which results from application of the idea of dynamic security is an incentive to action, and that the objective security arising from the idea of static security protects those in possession.

[25] *Tarde*, "Lois de l'Imitation," p. 159.

It is the duty of the legislator to choose between these two, whose relative value is undemonstrable, or at least undemonstrated. Only by virtue of that so subjective thing, a conception of life, can one be preferred to the other. Western legislators, as men of action, will lean in general towards the first, as favoring business, while those who are especially interested in defending established rights, partisans of the aristocratic or contemplative conceptions of life, will evidently incline towards the second. These latter will find support in the materialistic school of law, in that old formal logic which looks upon a right as essentially subjective and as only being lost by the act of its owner ("nemo dat quod non habet").

I do not believe that the world is necessarily bound to witness an endless conflict between static and dynamic security. First it must be noted that, in certain cases, certain institutions give satisfaction to both ideas. Formalism, often so reviled as contrary to the principle of economy of time, of which we shall speak later, and often wrongly said to be in decadence,[26] satisfies the static security of him who obligates himself and thus knows exactly when he is bound, and the dynamic security of third persons who know that a certain act has taken place and can make their arrangements accordingly. Marriage solemnities are thus important for third persons who are notified of the fact of marriage, as well as for the parties to the marriage contract.

§ 246. *Means of Mitigating the Conflict.* 1: INSURANCE. When, however, the two conceptions remain distinct in their consequences, there may be ways of preventing a hopeless opposition between them.

[26] See *Picard*, "Droit Pur," p. 222. See on this point *Jhering*, "Geist des Römischen Rechts," French ed., iii, p. 164. [For the latter work see "Law as a Means to an End," in this Series, p. 455, footnote.— ED.]

The first is insurance. One person has been injured by another, an accident of some sort has occurred; a choice must then be made between two solutions. Either the proprietor will be held responsible for losses caused through his property or his act only where he was at fault; the proprietor, like every active person, is thus granted security, his fortune will not be affected except by his fault,[27] and he will escape all liability by the use of a little prudence. Or, on the other hand, the injured person will be allowed to claim his damages even without alleging fault; but it must, in such a case, be admitted that he will have a very peculiar security for his activity or for his acquired fortune, whichever may have been injured by the accident.[28]

Insurance simplifies this conflict of interests, for the loss is ultimately borne by the insurer. The subject of debate, who shall bear the loss, is eliminated, or rather the question is presented from another point of view, and becomes the problem who shall pay the premiums, as insurance is not gratuitous. While not so troublesome as the other, this question is nevertheless of importance and its solution involves particular elements. The practical possibility of getting insurance must be considered, workmen being less able to do so than employers, and one must also consider the advantages of a hesitating legal system, the larger part of which is not explicit in all matters, which makes it for the interest of both parties to insure,[29] and thus it becomes possible

[27] This, of course, with the reservation that only fairly serious faults shall be considered, for everybody is at times guilty of slight faults injurious to another.

[28] The problem here is rather special, for objective responsibility protects now an acquired possession, now an activity. On the other hand simple liability for civil fault tends to charge now the master of an acquired possession (liability for the act of things), now him who manifests an activity (liability of the employer, of the owner of an automobile, etc.).

[29] Thus the same building is in current practice twice insured against fire, by the owner and by the tenant, the latter insuring his risks as lessee.

to reduce premiums, since two are paid for the same risk. In any case, this is a sort of mixed regulation which can come near to satisfying everybody.

2: PUBLICITY. The second procedure is publicity, which consists in saying that a person may depend on what appear to be the facts, as they result from certain measures of publicity. Thus the buyer of land may rely on the public records of deeds and mortgages, the purchaser of a credit on the statements of the debtor, a creditor on the statements in the declaration of marriage that no contract of marriage involving money matters has been made. If the owner of a right fulfills quite simple formalities, he will assure its conservation; he has only to conform to the appropriate law regarding publicity in order to guarantee his right against third parties. In this way a very convenient means of reconciling the differing interests of security involved in the situation is available. On one side is fixed what should alone be held to be proof; on the other, the owner of the right is offered the means of providing for his right the only evidence which will be admitted in regard to it.

§ 247. *Other Means of Settling the Conflict.* 1: IN CASE OF BAD FAITH. Outside of these two methods, reconciliation is still possible when the purchaser of the right is in bad faith; if he knows that he had treated with a merely apparent heir or with one who was not the true owner; if he knew that the declaration which he received did not correspond to the expressed intention; if he knowingly created a state of fact from which injury was sure to happen to him; where a neighboring manufactory would make the building he was putting up uninhabitable, for example. It is very clear that the principle of dynamic security has no application to such cases, for it would result in so direct and general

a destruction of the security of possessors that the end would be the disappearance of every actual right.

There is, however, one inconvenience in these solutions. The distinction between good and bad faith introduces into the law a psychological element always hard to establish, and therefore a little of their tranquility is taken away from owners of rights, who may be afraid of encountering a person of good faith, and also from the purchaser, who may fear to seem in bad faith. There is, then, not a compromise between the security of different persons, but rather a slight diminution in the security of each one.

2: WHERE THE PARTIES ARE IN GOOD FAITH; LIABILITY FOR FAULT. The law may, however, be charged with the duty of deciding whether the security of one person is to be preferred to that of another, both adversaries being in good faith. In such cases it will sometimes be possible to find a fault, imprudence or negligence, sufficient to turn the scale against the party who has been guilty of it.

This system, sufficiently rigorous where the fault is serious, becomes less and less satisfying as the negligence committed grows slighter. All security is lost if the owner of a right incurs what may be a heavy responsibility for slight fault, for as the fault grows less everyone feels himself less able to avoid committing it and to give the attention necessary to that end. The theory of full liability for slight faults, a theory which has been aggravated by the decisions of courts in their refinement of the idea of fault for the past century, is already a source of insecurity.

Without insisting further on the point, we consider it as established that fault itself is not an idea capable of indefinite extension. I suffer a loss if my banker sells negotiable paper which I have deposited with him.

Is it fair to say that I have been wrong in trusting a dishonest man? In fact I have merely trusted to appearances, just as did the purchaser who thought his vendor honest, and so believed him to be the owner. Was the buyer not wrong in buying from an unscrupulous banker? The fault, if any there be, is equal on both sides. Further, are there not many cases in which it is necessary in practice to make a deposit? Am I not obliged to deposit my negotiable paper for payment and for other purposes?

There are, then, necessarily some cases in which the legal system and the judge cannot avoid making a choice between the interests of different people, the interest of business and that of owners. The modern tendency is evidently to prefer the former, whether it be in a question of real or of personal property, of negotiable instruments, of the formation or interpretation of obligations, or even of their extinction.[30] It is true that this point of view is completed by another, the tendency to establish a risk of activity. To a certain extent this tendency is in contradiction with the idea of dynamic security.[31] But it may be explained by another idea,

[30] Hence the short periods allowed for bringing suits on warranty' for claims against carriers, and so on.

[31] We call attention to the fact that in proportion as the notion of fault is refined by the inclusion of ever slighter degrees, we approach the idea of risk, nowadays of great importance. How is this idea of risk applied? We have shown in the text that it is sometimes unfavorable to the person in possession (in measures favoring the purchaser of personalty, of instruments, in the rule "error communis facit jus," etc.), sometimes favorable to the maintenance of a certain situation by the system of equivalent; as when employers are obliged to assume the risk to workmen from accident, from old age, perhaps later those from sickness or unemployment; when the owner of an automobile or of an animal is made liable for any injury caused by his property. But this apparent contradiction, which makes the same person the beneficiary or the sufferer by this vast system of risk, is explained by the desire to favor the business man as against the bondholder, the workman who cannot bear the heavy expense of great losses as against him who can assume them without too much difficulty.

that the man who bears the risk is the better able to insure it. Practical necessities are thus satisfied by a series of half-measures.

§ 248. *Security Viewed in a Different Light: As a Sentiment.* Security should not solely be considered as creating stability or encouraging activity. It must be examined from another point of view which will necessitate a profounder penetration of its meaning. Security is a sentiment, as subjective as anything can be. It may, nevertheless, be considered both objectively and subjectively. It exists objectively when the result desired may be materially accomplished. But there may be no corresponding sentiment in the particular instance, and inversely there may be a deceptive security; a man may believe that he is sure of attaining a result when the opposite is true.

For the lawyer, the sentiment of security exists as soon as security exists objectively, but it is not so for the layman. Thus a certain publicity in regard to rights, a certain formalism, is made necessary; the posting of labor laws for the information of the public is assuming to-day a certain importance, for this publicity gives a subjective security to the world of labor, in place of the defective knowledge it previously had of its rights.

§ 249. *The Sentiment of False Security.* Inversely there may be a false security. In a certain measure, this must be admitted to be a good thing, for it may have as a consequence the determination of activities advantageous both to the person acting and to others. Men frequently decide to act solely because they do not see the dangers which surround them. Too acute a perception of redoubtable realities leads to inaction. False security, however, is often most undesirable and a cause of disaster, so it is most dangerous to spread a

sense of false security by seeming to give rights which are limited by an undisclosed clause. In this connection it is to be regretted that the legislator by his silence and inaction allows insurance policies, contracts of security "par excellence," to contain so many ambushes for the insured, and that measures have not been taken to make his real situation clear to him. Instead the attractive principle of liberty of contract has been exalted, as if a principle were good in proportion to the badness of its results.

False security should command the attention of the lawyer, whose duty it is to avoid embarrassing the public with it. If ever useful, it is only so in case of those special circumstances against which the imperium of governments should guard by fixing responsibility upon those who, having authority, should also bear its burden, that there may be no employment of this reason of State without proper grounds. This solution, despite its inconveniences, seems the least evil, the one which takes the least wrong account of the social interests and of the interest of security which are found to be involved.

Nevertheless, if false security is to be avoided, how can we escape being preoccupied with the general short-sightedness and carelessness — with the ardor with which men of business assume risks, thinking that they have on their side a security which they have not, and doing nothing to insure that security which they might have.[32] Must we not ask ourselves if a vague sentiment of security is not enough to determine action? Is not the attainment of complete security especially an idea of the lawyer or of the moralist, whose habits of research have made them unquiet spirits? Would it not be

[32] I appeal not to bookish erudition, but to the recollections of those who know men of business.

unfortunate if this state of mind became too general, for thought often kills action, and would not too great an obsession of general insecurity, if it pressed too hard upon the minds of men of action, be disastrous?

§ 250. *The Modern Social Conception of the Position to be Secured to the Propertyless.* Taking as point of departure what I look upon as the essence of our western civilization, and what has become really feverish in America, the taste for business, we may, perhaps, reach a basis, vague no doubt, for a reconciliation on a higher ground. After all, what is not vague if it be very closely regarded?

For a business man, time is precious, he cannot devote himself to exceedingly careful examinations; business must be done promptly, so he must be enabled to perform juridical acts quickly but safely. It is so much the worse for the worthy owner of movables, of negotiable instruments, who becomes a victim in consequence. Let him go into business, and what he loses on one side, the little losses which daily life will inflict, and which ordinarily cannot be averted for lack of time, he will make up for on the other. On the other side stands the working class, which has no property; static security will come to the manual laborer from pensions in case of accident, or of old age or infirmity, at the expense of the business man, who will thus pay a ransom. As everything is, however, imperfect, there will remain a group of persons who will support risks without any compensation; widows and children of the bourgeois class who can be neither laboring people nor employers. The institution of guardianship is a method of giving stability to their fortunes, but it is not an apt method. The modern social conception is evidently to push to action those who should be pushed, the propertied,

and to give security to those who are obliged to work because propertyless, though at the risk of social disorganization. This seems fairer than to say that others are responsible towards us to the extent to which we must have confidence in them to induce us to act (dynamic security), while to the extent to which we must have confidence in ourselves to induce action we are not liable, as in the case of a physician.[33] If the first formula is correct, the second is not, for it contradicts liability for things, for animals or for other persons, which does not encourage the man who takes over a piece of real estate for improvement or employs some one to help him in his business. Thus will be set up a form of security differing in accordance with social classes. A social order built up of distinct classes will develop, and the movement which is now perceptible will be not the least curious spectacle of the future, bringing us closer to a long distant past.

§ 251. *Psychological Considerations.* 1: DYNAMIC SECURITY. The psychology of security is worthy of more attention. It deserves examination successively from the two points of view which I have indicated, static and dynamic security.

When a legislator establishes a principle of dynamic security, it is almost superfluous to say that his end is attained when the degree of security given is sufficient to determine the doing of the act which the law desires done. Where possible, this point should not be passed, for there are in face of this interest others not less important. The security necessary, and that alone, is the object to be held in view by those imbued with the spirit of reconciliation. That the sentiment of security is normally equal to objective security may be

[33] See, in agreement, *Emm. Lévy*, "Responsabilité et Contrat," RCL 1899, p. 373.

taken as an approximate basis, no doubt imperfect, but generally acceptable, and especially so for the lawyer.

The degree of security necessary is governed by psychological factors. Sometimes a positive advantage must be assured to induce action. The legislator and lawyer, whose psychology is necessarily crude, and who are often obliged to reject exceptions, should take this presumption as certain.

As Mazarella has explained very well, the elements which form the psychological substratum of a juridical act are now individual, now collective.[34] When they are collective, as in the case of legal institutions, determination of the degree of security can only be approximate. The area of diffusion of the psychological presuppositions of legal systems cannot always be fixed, and this is even truer of the intensity of the sentiment which determines such or such an act.

The degree of security which is necessary and sufficient will vary with epoch and country. In troublous times, when nothing better is possible, business will be done with very little, since nothing better can be had; but if one lives in a society the transactions of which are ruled by a high standard of security, the guaranties demanded will be considerable. So countries which are quiet and orderly demand very extensive security, when doing business with countries in which disorder prevails. The simple but vague principle which must be applied, and which lies at the root of the theory of credit and of suretyship, to give what is needed but no more, is the source notably of the theory of the specificness of the hypothecary pledge, in contrast with the general hypothec of the old law. Perhaps the principle of the limited liability of the heir may finally result

[34] "Les Types Sociaux et le Droit," Paris, 1908, pp. 109ff.

from it, if it be judged that this innovation will not hurt credit.

But because security need not be excessive, it does not follow that it ought not to be as good as possible within the required limits. The guaranties given to an individual are not necessarily numerous, but such as are given should be efficacious. From this point of view Jhering is correct in the statement that lack of energy shown by the law against debtors is a proof of the decadence of law.[35]

From the idea of security also flows this principle: the creditor should be, as far as possible, guarded from changes in the estate of his debtor or in the thing out of which he expects payment. So it has become customary to allow him to claim insurance policies.

The extent of the guaranties to be given once fixed, another question arises. Admitting that perfect security is an impossible ideal, must not the inconvenience possible in some cases be met by advantages allowed in others?

If one considers in a general way the system which, assuming that certain inconveniences are voluntarily or forcibly imposed on him who desires security, consists in recompensing him by advantages that will eventually be granted in other hypotheses, it is clear that this system readily leads under color of compensation to the inconvenience already noted, the abuse of guaranties. When the inconveniences are voluntarily imposed, the system of compensating advantages and inconveniences seems a very satisfactory approximation in the quiet of the cabinet, for the opposing solutions, the losses and the gains, balance; but in practice, it introduces an important element of risk for those who desire security. It seems therefore preferable to decide that one does not

[35] "Der Kampf ums Recht."

voluntarily accept this system of an amplitude of risks for those who seek security by making possible gains equal losses.

The case is somewhat different when the guaranties given to a person present certain lacunæ. In the case, for example, of a mortgagee who may suffer loss, through the decrease in value of real estate or by the washing away of a part of the property, shall his mortgage, to compensate, be extended to cover all increase in value of the land, as by buildings or by alluvion? This question can hardly, if at all, be answered with the idea alone of dynamic security, for who could venture to say that this slight advantage would determine a loan?

2: STATIC SECURITY. The psychology of static security is different. When the law favors static security, that is to say is intended to establish a lasting situation, a right which will withstand wind and weather, the mental state of the owners of such rights should be considered. They are to be favored, they are to be made to feel safe. However, as I have already remarked, nothing in this world seems to be eternal, at least in its existing form. A right is constantly menaced by risks which are apt, sooner or later, to prove too strong for it: physical risks of loss or destruction; economic risks of reduction in value, of insolvency; social risks, menaces of new laws or of revolutionary movements; moral risks arising from the danger that public opinion will become hostile to a certain form of right. These risks seem insignificant when the right is created, but they are revealed on all sides as everything changes about the right, which little by little becomes out of harmony with its surroundings. Static security clamors loudly for repression of these surrounding circumstances, so that the right may be retained with all its advantages, may escape all risks as far as possible; and as the desid-

eratum of absolute security is so hard to realize, attempts are made to surround the right with a series of secondary fortifications which will strengthen its principal position. That desideratum may never be reached. Thus conservative governments and aristocracies, which do not look upon the security of their fortunes as a mere means of filling a great social rôle, end logically in a régime of social and moral oppression in every form. They develop an insanity for security. Some defect is being constantly discovered in the armor, which must be patched with a new piece. So the creditor wants the proof of his right made easy to him, wishes to be sure that he will not be dispossessed by the act of a third person or even by his own negligence, that prescription shall not run against him, and that the debtor be bound not only in his property but also in his person. The legislator may be impressed by these desiderata, but he should first reflect whether there are not more important reasons of public policy to be kept in mind. It all comes at last to this central point: the relative value of interests.

§ 252. *Combining the Two Forms.* Perhaps at bottom, admitting the importance of both static and dynamic security, the wisest course is to make a place for both, as institutions of two different orders, or to include static as an aspect of dynamic security, in accordance with the notion of modern western civilizations. In fact static security may be thought of as being only a vantage-point from which to act more freely along a given line. A manufacturer desires the security in his factory which results from a stable personnel, so that he can devote himself more exclusively to the development of the selling end of his business. A land owner wants to be sure of his title, in order to feel that he will not lose the factory which he builds on his land. Even

from a social point of view a proprietor or a capitalist must have a stable fortune to permit his devoting himself in tranquility to a particular social, political, or economic work. The human brain is only capable of a limited sum of activity, and certain conditions must be present to render that activity fertile. Relative security on one side, and on the other a field open to the risks of enterprise, seem in many cases a desirable solution of the difficulty [36] — an approximate solution, like many others, security even of limited extent being for certain spirits an encouragement to inaction, and not what it should always be, an aid to work with greater peace of mind in another field of action.

Accordingly laws on workmen's compensation, on unemployment, on retiring pensions for workmen, encourage lazy workmen to be imprudent [37] or negligent or to stop work as soon as possible, though on the other hand it is true that these laws, giving a sense of security to the man who works, should, from the point of the highly skilled workman, be ranged among those of dynamic security. But this view is in fact inexact because it is neutralized by another, the absolute necessity for workmen to earn their living. An idea can truly have the rôle of a force-idea only so far as it faces the possibility of a certain degree of freedom, of a possible play of will in one or another sense, which is not the case here.

§ 253. *Perfect Security Unattainable and Undesirable.* Finally it must be noted that this security, so important that it is readily made the basis of the law, is a Utopian ideal to a certain extent. Not only do natural events put obstacles in its way, but it has not even been

[36] This is why we have defended the utility, to a limited extent, of perpetual contracts. Sirey 1908.1.81.

[37] See *Pierre Hans*, "Les Abus dans la Législation sur les Accidents du Travail," in *Réforme Sociale*, 1910, pp. 473, 558.

realized in the domain of law.[38] In a certain measure, justice varies with judges; doctrinal systems, though they claim most often to be inspired by logic alone, are no less frequently divergent because of the same difficulty. Even under the mantle of logical interpretation, the judge succeeds in doing his own will and in turning the law.

Thus to sacrifice all to security is but to try for that which can never be completely attained. Perfect security would require the infinite immobility of society[39]; and it must not be forgotten that all institutions rarely fulfill their first functions, but serve many other ends than that for which they were destined.[40]

Finally the desire for security, strong as it is, is not everything, for man has a certain taste for risk. He finds in insecurity a certain joy of strife and triumph.[41] Has not, in truth, the desire for tranquility been exaggerated by the calmness of most of those who work on the law, though it does not follow that one would deny the need of security to be higher than the desire to run risks? Does not our European law at times lack something of the philosophy of the "strenuous life," a philosophy more virile and less afraid of taking chances?

[38] See *Ed. Lambert*, "La Fonction Dynamique de la Jurisprudence," cited note 11 ante, pp. 453ff.; *Mailleux*, "L'Éxégèse des Codes et la Nature des Raisonnements Juridiques," pp. 207ff.

[39] *Ed. Lambert*, op cit. p. 456.

[40] See on this principle, termed that of the heterogeny of ends, *De Tourtoulon*, "Principes Philosophiques de l'Histoire du Droit," p. 40.

[41] See *Guyau*, "Théorie d'une Morale sans Obligation ni Sanction," p. 209.

CHAPTER XIV

EVOLUTION AND SECURITY

HOW SOCIAL CHANGE AFFECTS RULES OF LAW AND JURIDICAL ACTS — THE PROBLEM OF THE ANTINOMY OF SECURITY AND SOCIAL CHANGE: (1) THE SYMMETRY OF FORMALITIES; (2) A FACTOR THAT CANNOT BE SLIGHTED, THE INTEREST OF THIRD PARTIES; (3) THE QUEST OF A MIDDLE TERM; NON-RETROACTIVITY, NON-PERPETUITY, INDEMNIFICATION — THE PRINCIPLE OF NON-RETROACTIVITY: (1) WITH REFERENCE TO STATUTES; (2) WITH RESPECT TO PRIVATE JURIDICAL ACTS — THE PRINCIPLE OF NON-PERPETUITY — STATUTE LAW, CASE LAW, AND CUSTOMARY LAW — THE PRINCIPLE OF INDEMNIFICATION — OTHER REMEDIES FOR THE CONFLICT BETWEEN SECURITY AND CHANGE — THE EQUILIBRIUM OF SECURITY AND CHANGE — THE SACRIFICE OF ONE TO THE OTHER MUST NOT OVERLEAP CERTAIN BOUNDS.

§ 254. *How Social Change Affects Rules of Law and Juridical Acts.* One of the safest conclusions which can be drawn from the study of social phenomena is that they are in a state of constant transformation. It is not to be supposed that the continual modifications which characterize the past are not to be renewed in the future. First of all we observe that nothing can prevent this process of social becoming. Whatever be the limits within which it is attempted to restrain the thought and the activity of man, there is always a time when

they are passed, even under liberal régimes.[1] As Mill says: "Although variations in character existing between ordinary individuals neutralize one another when they are considered on a large scale, exceptional individuals do not neutralize one another."[2] It is true that their effect may be neutralized in the long run by a series of oppositions of detail, but a temporary effect is produced, which is in itself considerable. The law, in conformity with the rule of constant development which governs society, must bend itself to certain transformations; the evolution of society leads irresistibly to an evolution of law.[3]

It is, furthermore, essential that there be a possibility of better adapting the rule of law to identical phenomena; this is the progress of law, properly so-called. This posssibility of social rearrangement may be manifested in various ways: first of all by the principle that juridical acts, whatever they are, are all susceptible of modification or extinction.

It will evidently be admitted that every rule of law arising from statute, contract, or a unilateral act may be abrogated or changed at a given time. The law, however, varies its procedure considerably, in accordance with hypotheses, where the application of this principle is involved. This comes from the fact that the interest of social rearrangement conflicts with security, whether static or dynamic. These two interests are hard, on

[1] *Jhering* declares even that, for this reason, the State should never bind itself absolutely. ("Zweck im Recht," French ed. p. 278.)

[2] Quoted by *Tarde*, "L'Opposition Universelle," p. 326.

[3] As *Jhering* says: "Law is the Saturn who devours his own children; it can rejuvenate itself only by breaking with its past. A concrete law, which, because it has once existed, claims absolute and accordingly perpetual existence, is like a child who strikes his own mother; it derides the idea of law even in invoking it, for the idea of law is a perpetual becoming, and what has come to pass must give way to that which is coming to pass." "Der Kampf ums Recht," 1906 ed., p. 9. Compare *Tanon*, op. cit., p. 63; *Mail leux*, "L'Exégèse des Codes," passim.

some points impossible, to reconcile; it would be like reconciling immobility with movement, or one movement with another in an opposite direction.

Before examining how these changes are made, let us consider one question by way of preliminary: what are the needs and sentiments to be satisfied by changes brought about in the juridical order?

They are extremely numerous and diverse. First there is the appearance of new and the disappearance of old needs, both of which require transformations of law. Inventions, for example, necessitate legal changes for their utilization; the discovery of new means of transportation, automobiles and aeroplanes, makes necessary a new regulation of the respective rights of those who travel, just as formerly the discovery of railways caused a modification of relations between travelers, between carriers and shippers. So physical changes, the disappearance of forests, reforestation, volcanic eruptions, and so on, necessitate certain alterations in existing laws.

Racial modifications, also, resulting from immigration, or important changes in density of population, make former rules unsuitable. Many established conditions must be altered to respond to transformations in public spirit, in morality and religion. In some minds and in some peoples there is to be taken into account an often unreasonable need for change, which is only a need of varying a moral horizon so imperfect that it becomes wearisome. Economic modifications connected with a greater intensity of production, of consumption, or of circulation, may make old rules intolerable.

How can these two interests so frankly antagonistic be reconciled: the requirement of security satisfied, lending all its force and rigidity to the protective system of society and law, and the need of change, the need of

that suppleness which presupposes a reasonably adaptable legal and social organization?[4] At first sight it seems impossible to unite in a harmonious whole tendencies so divergent.

§ 255. *The Problem of the Antinomy of Security and Social Change.* 1: The Symmetry of Formalities. There exist, to meet these difficulties, buffer institutions, as yet imperfect, which however render the shock between the two colliding forces less severe.

The first idea for striking a balance between opposing views appears, as frequently happens, to have been wholly formal, and it is remarkable that we are still living in part under the empire of so archaic a theory. This system is that of the symmetry of the forms for the creation and extinction of rights — their modification being really a partial extinction. There is no use in repeating what is well known, that the Romans, in primitive times, had a complete symmetry between the formalities necessary to create and to extinguish an obligation. The strange fact is that our modern point of view is a little but not very different from theirs. Dominated by the principle of static security, we hold to the rule that every juridical act can be recalled only by the same persons who collaborated in bringing it into being. We go no further; the consent of the original actors, persons or authorities acting ex officio, seems necessary, and sufficient, to annul or modify the juridical act. This double principle appears to be very just. It is connected, indeed, with one of the most important interests to which the law must give satisfaction, but admits what this interest requires only so far as it is necessary; nevertheless, it is not of absolute value

[4] This question appears in the philosophy of the sciences in a slightly different form; that of the "posse" instead of the "debere." But it is at bottom the same problem. See *J. H. Rosny* senior, "Persistance et Changement," *Revue du Mois*, April 16, 1909.

viewed in any of its aspects. The principle of security, important as it is, may be confronted by other principles of equal value, and again it may be invoked in cases to which it was never intended to be applied. Respect for juridical acts, and for contracts in particular, has been raised by many to the rank of a veritable fetich. We recognize the gravity, the capital importance of this principle. Regarded in itself and in the social rôle which it may play, its importance is so evident as not to be worth dwelling upon. We desire, on the other hand, to insist particularly on the opposition between it and the principle of adaptation to new situations. We thus touch on the fundamental conflict, or at least on one of the gravest, which concerns the law.

Is it always suitable that a juridical act should not be changed except with the consent of all who took part in it? The question may be presented in regard to contracts or other acts. As regards contracts, it is very natural at first sight that they may not be modified or abandoned at the will of only one of the parties. This is required by the idea of security. But this idea has unexpected turns. In the abstract it requires that a contract mechanically unfold its consequences. But viewed concretely, security may demand that he who does not get his due under a bilateral contract may put himself on the defensive and himself not perform. Mutuality of performance is a fair requirement. This is the basis of the important "exceptio non adimpleti contractus,"[5] which permits the avoidance of certain risks by the maintenance of the statu quo, in spite of any anterior obligation.

It may be necessary to modify or to cancel a contract without the consent of all contracting parties for other

[5] For more details see "Des Modifications aux Contrats par Volonté Unilaterale," RDC 1907, p. 251.

and different reasons. If it be desirable that the contract should meet an end which only one of the parties is able to appreciate, or for the realization of which he alone is able to judge of the value of the means employed —or if the act pursues several purposes at once (for voluntary action is indeed always complex)— at a given moment new circumstances will cause one of the aims pursued to take the lead of the others. The latter end may even be sacrificed in case of need, as it happens when it becomes necessary to modify an institution —an endowment or a company — which may in fact lose part of its former nature with the consent of all interested.

All this finally turns around a general idea, the limitation of human intelligence — a limitation which is double, internal and external so to speak. Man is so made that his outlook is usually limited through lack of reflection, of penetration, of self-questioning; his desires are left more in the form of an indefinite protoplasm than clear, closely connected, and sharply defined. In the second place, the world which moves around us, though to what extent we do not know, is subject to laws which we shall never wholly understand, so that foreknowledge of social, moral or even physical happenings is impossible[6]; the keenest intelligence cannot foresee all that will come to pass, and risks foreseeing anything but that which actually does happen.

Not only contracts, but other juridical acts, unilateral acts, may be recalled without the consent of all who participated therein. Let us leave to one side the question whether it is enough if all participants consent — whether third parties may not have relied on the act, and may not so deserve protection. It is here sufficient to state that in certain cases it may be useful to require

[6] See *Boutroux*, "De la Contingence des Lois de la Nature."

for some act more formality, or less, than for the act of opposite character with respect to the idea of symmetry. There may be reasons having to do with the gravity of the act or with the necessities of economy of time, for allowing the destruction or transformation of an act to be easier than its accomplishment. It is thus with servitudes, which except in the case of a will presuppose consent for their creation, yet may be extinguished by a unilateral revocation. So administrative acts may be revoked by a simpler formality than that marking their promulgation.[7]

The factor of social change, as showing the necessity that the obligations of everybody be subject to modification, is important, and rightly so. In the matter of contracts, and juridical acts of longest duration, it becomes especially so. Nothing changes more easily than statutes intended by their own expressions to be eternal, for nothing runs greater risk of becoming out of date, of accommodating itself badly to new circumstances. There are even permanent organisms to change them, parliaments. Companies, partnerships, even foundations, find it hard to modify their regulations, having ordinarily a shorter life than States. As for ordinary juridical acts whose duration is inconsiderable, they are considered almost unchangeable without the consent of all the principal persons interested.

2: A FACTOR THAT CANNOT BE SLIGHTED, THE INTEREST OF THIRD PARTIES. The question which we are studying has still another aspect. Is it quite satisfactory if the same forms have been used, the same consents obtained to modify or to annul a juridical act, which were employed in its inception? We do not think so. We believe that this is a wholly formal view of a problem which must be more thoroughly studied.

[7] See, for the religious orders, Law of July 1, 1901, art. 13.

It is an error to believe that an act interests only the parties to it. "Conventions take effect only between the contracting parties, they neither injure nor profit third persons," article 1165 of the French Civil Code, is not alone only true in a certain sense,[8] but the more general principle must be adopted that legal acts interest third persons to a very considerable extent. This is true of contracts. Am I not interested in knowing whether my debtor is borrowing of others, whether the manufacturer to whom I am giving orders has other customers, or whether I have a monopoly of his products? Does it not interest me whether the property which I have bought is leased or free for occupancy?

The idea that the contracts of third parties do not interest us, is one of those extreme simplifications of facts which, true in very many cases, are often false. Like all simple ideas, which may work such mischief, it must be viewed with great suspicion.

How much truer is this of unilateral acts — of all those included in private law; renunciation of servitudes, waiver of limitations, acceptance of a succession, and others! Such acts are of the highest interest to third parties, so they are generally declared irrevocable, because so many third parties may have relied upon them and counted upon their continuance. This is a requirement of security, to which all idea of social transformation is necessarily sacrificed.

On the other hand, by a strange peculiarity which can only be explained historically, as a survival of the old symmetry of the forms for the creation and extinction of juridical situations — as a survival of the old idea of the chief of the clan or of the absolute sovereign, who

[8] See especially "Des Effets Juridiques des Actes Juridiques à l'Égard des Tiers," thesis by *Juille*, Lille 1904.

does as he pleases in spite of circumstances [9] — it is universally admitted that new administrative and legislative acts may supervene and modify everything which has previously been done by the same means. A mayor, by a police regulation, has created a lawful situation depending on which money has been spent, commercial operations entered into. The regulation is none the less revocable at pleasure. Under the name of acts of the public power, administrative acts, and above them statutes, remain as absolute as was the good pleasure of the chief. The product is differently made, by more visible methods, but it is notwithstanding identical. The possible statute of to-morrow which may hinder or help our enterprises, while a ground of hope for some, is a direct attack on security, either static or dynamic. Is it necessary to do more than to state the known fact that the menace of a new tax, the submission of a bill modifying the extent of mining rights, or employers' liability, or imposing measures of preventive hygiene, makes trouble for the persons who have counted on the state of facts arising under former laws and have acted in the expectation of its continuance?

3: THE QUEST OF A MIDDLE TERM: NON-RETROACTIVITY, NON-PERPETUITY, INDEMNIFICATION. How can we settle the serious conflict here arising between security and evolution? Here, as elsewhere, the problem cannot be satisfactorily answered in every case. Security, a subjective sentiment, is evidently variable according to time and individuals, and to permit innovations only where this sentiment will not be wounded is to treat as settled a question of individual psychology which can be known only by often highly approximative general suppositions, is to take into consideration senti-

[9] See on the earlier characteristics of statute law, *Maxime Leroy*, "La Loi."

ments which may be exaggerated by fear, itself a fact but frequently contrary to exterior reality; and is finally to admit the application of new statutes frequently with so much delay that the desire for change is not satisfied.

What is the mean which will come near to contenting all these opposed interests? It seems to me to be found in putting statutes, in certain connections, on the same footing as other juridical acts, in treating them as juridical acts like the others,[10] and in applying to them, as to the others, certain principles, those of non-retroactivity, non-perpetuity, and indemnification.

A statute is at bottom but a juridical act, like any other, though this idea must evidently be carefully construed. I mean that a statute, like any juridical act, owes its force to preceding organizations, to anterior states of fact and of mind. There is more power in these states of fact and of mind because of the idea which we now have of the sovereign law. Absolute power has passed from the hands of the chief of the clan to the King, from him to the national assembly; we create in our minds a hierarchy of legal authorities at the head of which we put the law — that is the whole story. But a statute is only a fact, a text which we in modern times so surround with the strength of our respect that it is hard to overcome by force. Except for resolute men who have nothing to lose and who have the courage to take every risk, as is sometimes the case with revolutionary parties, it is invincible to direct attack, but it is much easier to capture by ruse.[11] It maintains itself nevertheless at the level necessary for practical activity just about to the extent demanded

[10] Compare *Duguit*, "Le Droit Individuel, le Droit Social," p. 44.

[11] *See Tarde*, "Les Transformations de l'Impunité," in *Réforme Sociale*, November 16, 1888.

by habit and traditional morals; it preserves a force which appears very great but is relative in its application.

Three points will therefore successively engage our attention:

(1) The question of non-retroactivity.

(2) That of perpetuity.

(3) That of the right to commit injury on payment of damages.

§ 256. *The Principle of Non-Retroactivity.* 1: WITH REFERENCE TO STATUTES. Admitting that any juridical act may sometimes be found to be changed or annulled without the consent of all interested, often even of those chiefly interested, it has become necessary to find a way to reconcile this interest of social change with the need for security. Thus has arisen the theory of the non-retroactivity of laws and of administrative acts; and thus also, the theory scarcely sketched out as yet of the non-retroactivity of private juridical acts.

The formula put forward by the written law to reconcile these two opposing elements, the need o security and the need of promulgating new texts, is well known: "The law takes effect only for the future, it has no retroactive effect."[12] It is not surprising that legal science has not yet succeeded in constructing a practical system which will satisfy both. Very many persons act or are preparing to act on every rule of law. My right to build on my own land induces me not to buy a house even if it is offered cheap, as I expect to construct one of my own. Naturally any different rule of law that were to be promulgated, forbidding construction, for example, in certain wet localities or near a factory, so as to apply to my land, is certain to affect my interests. Accordingly, even if the law applies only to the future, it is going to attack my security, for under the sway of

[12] Article 2, French Civil Code.

the former law I already had a kind of mortgage on the future.

The sole formula which would be satisfactory to both sides would be one which took into consideration subjective security. I may not have have known of the existence or of the extent of application of a legal regulation. It is of no importance to me to lose the right to build if I never thought of building myself or of selling my land for that purpose, so that the law which deprives me of it takes away nothing which I cared for or on which I counted. On the other hand, if relying on the present law I had planned to build or to sell, the new law affects me. A merchant who has retired with an income of two thousand dollars, which he calculates will be enough for his household with forty dollars a year taxes, will be obliged by a new tax law raising his tax to eighty dollars either to go to work or to reduce his style of living. Such a subjective criterion cannot be applied in practice; it is too vague in extent, too delicate in application. It would also so delay the satisfaction of the need for social rearrangement that it would be unfortunate on that account as well.

In practice, accordingly, very unsatisfactory formulas are adopted, as: the new law does not affect rights but only hopes; "tempus regit actum"; a right may not be suppressed, but certain advantages flowing from it may be cut off — as if a right would not be gravely impaired if its content were taken away! These are all bad, wholly and necessarily bad solutions of a difficulty which seems insoluble. No more than approximations can be discovered, but this should certainly not discourage research, for there are evidently degrees in approximation, and diverse formulas may be presented for special cases as sufficiently satisfactory.[13]

[13] The old theory of non-retroactivity which prevailed during the 1800s dated from an epoch in which security was the principal con-

The solutions generally accepted are connected especially with the idea of static security: he who by virtue of an old law has acquired a certain situation of fact should keep it, even if a new law forbids such acquisitions. If I have made a will, or done any other act under the empire of the existing law, the act remains valid even if a new statute prescribes a new form. An inheritance devolved is not affected by a change in the law of successions; an acquired right is not lost even though the way in which it was acquired is made illegal, even it it was acquired by the exercise of a right later suppressed, as for example by a change in the legal rate of interest or in the method of assessing damages.

On the other hand, if an individual is menaced in his dynamic security, he profits no more by the old law. If I had expected to avail myself of my right, to build on my land, to transform a building into a factory, I am at the mercy of a new law regulating construction, the installation of a factory, or obligations towards neighbors. I had counted on doing something under the old law; this I can no longer do, and I shall be more or less in the position of one contracting party who sees the other withdraw his promise.[14]

sideration. Thus it was said that a new law could not touch acquired rights but only hopes, except that there was great difficulty in distinguishing these terms in concrete cases. In our day the theory of evolution has deeply impressed the minds of lawyers; security is less considered, and attention is given to smoothing the way for necessary transformations. Thus the tendency is to say that a new law should respect the facts of the past, but may dispose of the future at will. See *Vareilles-Sommières*, "Une Théorie Nouvelle sur la Non-Retroactivité des Lois, RC 1893, pp. 444ff.; *Planiol*, "Traité Élémentaire de Droit Civil," vol. i, no. 256. Compare my note in Sirey 1910.2.25. It is certain that this is a blow to security. No one of the theories, old or new, solves the problem satisfactorily, which from certain points of view looks like that of squaring the circle. From this sharp conflict between irreconcilable interests arises an obscurity as to these questions not apt to disappear. Doubtless it will only be cleared up by numerous distinctions.

[14] Compare my note in Sirey 1910.2.25. It is curious, in view of the progressive development of the spirit of business, that new theories on

But the limit between static and dynamic security is not easy to establish. In the complexity of actual life they contain notions which separate or intertwine, according to the particular case in view.

Further, there is the practical idea that while the operation of new statutes may be delayed, it should not be for too long. That mighty lord, the law, will tolerate a certain slowness in obedience to his orders, but not too much. For example, have measures on hygiene and safety of workmen been put into effect solely in regard to factories opened since the law was passed? Behind all this, there is a right asserting itself very vigorously, because it considers itself as representing a higher good, but this latter is essentially complex and changeable, and it cannot be denied that it does violence to security.

Security, in the face of social development, examined from the point of view of retroactivity, appears then not as a mass which can be carved into a sharp-edged form, but as something indefinite, whose vague outlines cannot be suitably adapted to the need of realizing new ideas.

2: With Respect to Private Juridical Acts. The question of retroactivity does not concern legislation alone, but arises also with regard to private juridical acts. When one juridical act follows another, whether to cancel or to consolidate it, the law has to consider whether the later act will take effect simply for the future or retroactively.

The security of transactions requires that, in relations with interested third parties, new juridical acts should not be able to take effect from the date of those which they modify or destroy, or from any previous date whatso-

non-retroactivity of laws take less account of dynamic security. This is due to the fact that the rapid application of new laws seems even more favorable to economic activity. See the new Swiss Code, final title, and the Swiss Federal Code of Obligations, arts. 882ff.

ever. This system is that of article 1338 of the Civil Code for confirmatory acts, and of article 790 for repudiations of renunciations of successions.

From another point of view, however, the necessity for adaptation to new circumstances, which is only a form of social change, requires that these acts shall produce, to a certain degree, an effect against third parties.

Is no compromise possible between the interest of some in being able to indicate at the beginning that a subsequent act will take effect at a date fixed from the beginning, even against third parties, and the interest of others in defending themselves against this retroactivity?

Before attacking this problem, let us admit that there is a limit beyond which retroactivity cannot be pushed. By means of retroactivity one act perfects (a condition, an acceptance), nullifies (a fatal defect, a withdrawal), or completes (a confirmation, publication); another cannot be made retroactive as regards third parties beyond the date of the original act with which it is connected. Between the parties, anything may be admitted, provided that other principles be not involved, as for instance that of respect for the will, with which is bound up, among other matters, capacity. But where third parties are concerned, to touch acquired rights, rights based on others which were pure and simple, is to injure security without any apparently good reason for so doing. Thus a conditional instrument, for instance, may retroact at the furthest, after the condition is executed, to the date of its signature.

It may, however, be left to the parties to say that their juridical act, or his if it be unilateral, shall be performed in such a manner as to be plastic, rather than rigid — conditional, annullable, revocable; and they may say that this situation shall continue for a longer

or shorter time. The law will protect this right. The Civil Code even admits that a condition may remain for centuries in suspense, since conditional rights are not subject to limitation.[15] This makes it possible to say that the actual situation will not be determined till later; but as the consequence would be troublesome on the whole, being an infringement of security, which calls for clear and exact, not indefinite situations, it is rationally admissible only to a limited extent.

The conditions of the limit to be established may first of all be found in the idea that retroactivity is useful, if at all, only to insure the repayment of the capital and not to safeguard accessory things — profits, freedom to occupy a leased building, and so on. Beyond this point, retroactivity is neither desired nor advisable.[16]

Thus restricted, is retroactivity admissible in a private act resulting merely from the will of individuals, as in the case of conditions, or from the will of the law combined with that of individuals, as in the cases in which an heir who has received property from his ancestor is obliged to include it in the estate for distribution? We are here in the thick of the old conflict between static and dynamic security. The latter urges that third parties be protected; the former that the contracting parties in the case of a condition, that the heirs in the case suggested, the donors in cases of revocation of gifts, the parties to any annulled instrument, be protected.

The written law has been vaguely conscious of this difficulty, as clearly appears from the hesitation with

[15] French Civil Code, art. 2257.

[16] See my "Études des Droits Éventuels," 87ff. Compare *Chausse*, "Rétroactivité de la Condition," RCL 1900, p. 542, who reaches the same conclusions.

which it has treated the effect on third parties of cases affecting successions [17] and entails [18] and of gifts.[19]

A compromise may be attempted by establishing a form of publicity, and by providing that only when it has been observed can action be taken against third parties, but it will remain to be seen whether other measures will not be necessary.

There is another method of reconciliation which may be used concurrently with this: it consists in proceeding against third parties only when satisfaction cannot be had of the other party. This procedure, which amounts to preferring, in certain cases, execution by equivalent to execution in nature, we will later take up. At present it is enough for us to mention the utility which it would have in this connection through the adoption of a rule allowing action against third parties only after unsatisfied execution against the property of the debtor according to article 930 of the Civil Code.

§ 257. *The Principle of Non-Perpetuity.* Another way of reconciling the interests of security with new needs which call for satisfaction, is to allow to juridical acts, and even to statutes, a limited duration only.

The question of the perpetuity of obligations, and in a general way, of rights, seems to have been only recently raised.[20] That of the perpetuity of statutes is yet unexplored.

It is very certain that the naïve and robust faith of the ancients led to perpetuities, just as to-day pride prevents our seeing how fragile and temporary are our legislative combinations. Would it not be more suitable to pass laws for a limited length of time, but irre-

[17] Civil Code, arts. 859ff., 929, 930.
[18] Civil Code, arts. 1069ff.
[19] Civil Code, arts. 958ff.
[20] See note by *Barthélemy*, Dalloz 1907.1.338, that by *Planiol*, Dalloz 1906.1.249, and my note in Sirey 1908.1.81.

vocable during that time,[21] and to authorize, as a general rule, contracts only of limited duration?

The legislation of the Revolution appears to have been the first in which this second question was considered.[22] If, however, temporary laws are few,[23] temporary international treaties are more common. In any case, practice has actually put the question of temporary legislative acts unfortunately on an ill-chosen ground, as such temporary laws have often been laws of exception in the bad sense of the word.[24]

To make a rational use of temporary laws, several desiderata would have to be satisfied at the same time. They should not last too long or too short a time, and they should be renewed long enough in advance for people to know beforehand what to expect, thus avoiding that uncertainty which is a bar to business. With this reserve, laws could be passed at successive intervals or in the method provided in the Spanish Civil Code, which is better than simple periodic revisions. [25]

Must we also admit that all contracts, or rather that all private juridical acts, should be subject to revision or to renewal at fixed periods? This arrangement would be admissible for contracts or for acts entailing long continued relations. There would be no obstacle to providing for periodical revisions, for long terms, of the charters and by-laws of companies, of acts of endowment, or of contracts of partnership.[26] Such

[21] This would answer, better than the present situation, to the need of society not to rest on wholly provisional rules. See on this very real need, "L'Évolution du Droit," p. 82.

[22] See the Law of December 18-19, 1790, art. 1.

[23] See nevertheless the Law for Algeria of Dec. 21, 1907, and that of Dec. 24, 1904, on disciplinary powers in mixed communes.

[24] Notably the Law of Dec. 20, 1915, on prevost's courts.

[25] Spanish Civil Code, additional disposition, and introduction to the French translation by *Levé*, p. xxxi.

[26] The strife between security and adaptation is so sharp in regard to long continued acts, that it is impossible to regulate them without

a plan would allow the changes required by evolution. but would not be too serious an infraction of security,

It cannot be questioned that acts thus limited in duration, but renewable, would involve an expenditure of supplementary activity, and would thus be contrary to the idea of economy of energy; and besides, such renewals and modifications of contracts and laws might take place in moments of irrational enthusiasm for some particular idea. Opinion may be in bad shape for the revision of one or another law.[27] But are not these inconveniences, which we do not minimize, often less than those arising from legislative instability, and from the existence of an archaic law protected by the forgetfulness of the legislator? In any case, observe that our solution, which in spite of all seems preferable, has the advantage of suppressing the difficult question whether laws and administrative acts are abrogated by non-usage. To admit the affirmative is to run counter to security, for how can it be known what non-usage is sufficient? But to reject repeal by non-usage would admit statutory anachronisms, and would deliver a blow against subjective, in the pretended interest of objective, security. A system which would obviate this difficulty has some advantage.

§ 258. *Statute Law, Case Law, and Customary Law.* The necessity for making law respond to new ideas and new needs brings up the grave question of customary law and of the rôle of judicial decision. If it be admitted that law should bend to new exigencies, custom may readily be allowed to rule a part of human activity,

taking it into account. Recall the famous discussions over the revision of charters of companies. As to endowments, note the labors of the Société d'Études Legislatives (see the report of *Larnaude, Bulletin*, 1909, pp. 302ff.; observations of *Saleilles*, pp. 319ff.; final draft, p. 445; and *Jean Escarra*, "Les Fondations en Angleterre," pp. 205ff.

[27] See *Planiol*, "Livre du Centenaire du Code Civil," "Inutilité d'une Révision Générale du Code Civil," vol. ii, v. 960.

and the work of the judges in clearing up uncertain and obscure points may be looked on with favor. The remarkable services which this latter can render in assuring a deliberate progress of law by filling in gaps and by correcting solutions cannot be denied. Such a system, though, is in absolute opposition to the principle of security. A choice must be made between the two, and we see no basis for a complete reconciliation. Reconciliation is possible only in very unsatisfactory fashion: a system of judicial law established under the empire of old ideas on certain special points, when new ones are submitted later, may settle them in accordance with a new spirit. The result will be a certain disparity, but satisfaction will be given to old and new ideas. It must not be forgotten, however, that juridical decisions are only one aspect of law — the law in judiciary strife[28]— so that the law of practising lawyers is uncertain on all the new questions that may possibly be raised.

Here are the elements for the solution of the famous conflict between the classic and the modern methods of interpretation[29] — between statute law, case law, and custom. It is very true that these modern methods, whose value we do not misconstrue, have the inconvenience of not giving the same security as the old, since they rely less on pure logic [30] and lay the greatest stress on adaptation. Therefore it sounds to us more like praise than blame to remark, as is often done, that the defenders of these innovations, after giving every

[28] *Picard*, "Le Droit Pur," p. 55.

[29] It is almost needless to cite the famous work of *Gény*, "Méthode d'Interprétation en Droit Privé Positif." Compare *Van der Eycken*, "Méthode Positive d'Interprétation"; *Mailleux*, "L'Exégèse des Codes et la Nature du Raisonnement Juridique"; *Esmein*, "La Coutume doit-elle être reconnue comme Source de Droit?" *Bulletin* of the Société d'Études Législatives, 1905, p. 535. [This subject is a main topic in vol. ix of the Modern Legal Philosophy Series. — Ed.]

[30] On the utility of logic from this point of view: *Meynial*, "La Logique dans la Formation du Droit," RMM 1908, p. 186.

liberty to the judge, and laying great importance on doctrine, finally fall back on the statutes.[31] Yes, as Leroy says, theory seeks to destroy itself and to consolidate its results all at once; statute law appears the invincible rear guard which definitely occupies the positions fully conquered by judicial law. Does not this apparent opposition, however, take into consideration, in a happy manner, the needs for security and for constant change? One may call for a greater legislative activity even while one approves a bold, innovating case law. One does not exclude the other, for we shall always feel the need of a certain degree of stability.[32]

§ 259. *The Principle of Indemnification.* A third way of reconciling opposing legal aspirations is indemnification. The actual owner of a right is expropriated, but he is paid an indemnity. He will, perhaps, suffer inconvenience; he will get a sum of money in place of the exact advantage he sought.[33] But apart from the annoyance resulting from a forced exchange, from difficulty in fixing the value of rights, the system is admissible.

One may invade the right of another, but on condition of paying an indemnity. This principle is acceptable in a great many hypotheses, affecting all manner of juridical acts — statutes, administrative acts, private juridical acts. In fact, if a right has been injured and an indemnity paid, he who did the injury has no doubt secured an advantage he would otherwise not have had. When a Government officer condemns property, when a proprietor cancels of his own accord a sale to a contractor,[34] when an employer discharges a workman, paying him an indemnity, he generally does it because it is

[31] *Maxime Leroy*, "La Loi," pp. 228ff.

[32] Compare *Bouglé*, "Solidarisme," p. 83.

[33] [This book has a later chapter on "Execution in nature and by equivalent," not here translated.—ED.]

[34] French Civil Code, art. 1794.

to his advantage, or because of a social benefit to be accomplished through the condemnation. Such a procedure conforms to the general interest sometimes to a considerable degree. We must not, however, be led astray; that this principle be applied, another object is necessary than that the damaging party shall seek to secure something in place of the money which he has to pay. This is why reëmptions [retraits] — expropriations of private utility they have sometimes been called — are useful only when they permit an objective advantage, like the suppression of a lawsuit or of a joint-tenancy, and not when they are exercised solely for the good pleasure of the person entitled to purchase.

There is here a limit, but a very hard one to establish, to the principle that a person can be obliged to suffer injury if an indemnity be paid. For to what extent can I reasonably operate a factory which injures my neighbor, under the sole condition to pay him his damages after taking the precautions recommended by experts? Can he force me to pull down the factory, or can I go ahead on paying him a sum of money? The question appears to have been hardly conceived.

The second limitation to the principle is that there are certain rights which the general interest would seem to demand should be preserved inviolate in the hands of their owners. The rights to life and liberty are striking examples.[35] But there are many others, as the right to choose one's work, and so on, and we shall refer to them later under their respective headings.

Finally, we must not forget that such a system can only operate if there be provided serious guaranties

[35] This, let us note in passing, is the origin of passionate disputes over the death penalty and war. If society grants security to its members only with the declaration that they may eventually find death in war or on the scaffold, security is given and taken away at the same time. To give it, its object is itself sacrificed.

for the fair calculation and certain payment of an indemnity. The injured party must have that "fair and prepaid indemnity" spoken of in article 17 of the Declaration of the Rights of Man, or any other equivalent measure.

Although, however, the right to an indemnity is readily recognized where private individuals are concerned, a considerable effort in the case law of the Council of State has been necessary to admit it when the injury comes from certain administrative acts; and when it comes from legislative acts, this right is still contested, even by theoretical writers.[36]

§ 260. *Other Remedies for the Conflict Between Security and Change.* We call attention finally, as an example of accessory modes of compromise, to the system of suppressing certain Government offices only on the disappearance of their holders. This system is rather administrative than judiciary, and has been adopted only in certain statutes.

It is possible, further, at least in statutes, to reconcile security and change by defining a certain period during which the old state of affairs shall continue, but after which the new law shall apply. As static and dynamic security usually refer only to a certain length of time, and as the human intelligence is limited in its outlook, this rough method brings fairly good results. It has been applied in several recent laws, such as that of July 29, 1909, on the use of white lead.

This leads us to a consideration of still another system of reconciliation, which consists in the application of a new law by successive stages, like the Law of March 30, 1900, on hours of labor, which is applied in three

[36] See *Duguit*, "Le Droit Individuel," pp. 93ff. See, however, for an example of indemnification, French Law of Aug. 2, 1872, on the match monopoly, art. 3.

stages at two-year intervals. In this instance, however, there is no longer any principle at stake, even partially. The method is to limit each claim, as a judge reduces too high a bill by fixing a sum between the extremes claimed by each side. The compromises possible in this way are infinite.

§ 261. *The Equilibrium of Security and Change; the Sacrifice of One to the Other Must not Overleap Certain Bounds.* The different methods which we have indicated may seem insufficient to those who, impatient of the yoke of the past, are in a hurry for innovations which will establish the order of things in which they believe. Are they wrong? It will all depend on the sentiment for security which will continue in the face of their innovations. It all depends, furthermore, on the value of that sentiment. If its object is only to allow a pretended aristocracy to enjoy existence at its ease without any advantage to the community, it is in opposition to what I have already termed our western conception of life. Consequently if the innovation does not proceed too fast it is not to be regretted.

On the other hand, the legislator ought not to forget, any more than any one else, that in every people at every epoch there is a sort of saturation with the desire for change, the limit of which is passed when transformations come too fast and cover too many points. The statute which undertakes to satisfy at once the instincts of public opinion runs the risk of being enforced only to a limited extent, if at all.[37]

Finally, as Montesquieu very clearly saw,[38] there is in every society a limit to the possible sacrifice of security to progress. Hence the necessity of the institution

[37] Such was the state of public opinion in France towards the period of the Directory. See the brilliant pages of the *De Goncourts*, "La Société Française sous le Directoire," conclusion.

[38] "Esprit des Lois," Book vi, ch. iii.

whose value is so well shown by Hauriou. A society, as the latter author remarks very justly, endures very well an internal struggle for existence, but on condition that beside the regions at strife there are others at peace. If part of its machinery is bad and compromised, there must be other parts which are solid and approved.[39]

Moreover, as Courcelles-Seneuil says, nothing is more contrary to respect for, and to the very idea of law, than instability of law and legislation. Law is the solid frame of human society; it should be changed only in good earnest, after careful study and deep reflection.[40] But as Spencer remarks, it must not be forgotten that one of the radical conditions of largeness of thought is to avoid extremes, and that means a careful estimate of opinions if we are to be safe.[41]

[39] "Science Sociale Traditionnelle," p. 193.

[40] "It is the sentiment of this necessity," he adds, "which renders true lawyers prudent and almost cowardly, which inspires them with a respect for form, and which makes them hesitate before every project of change; they know the power of habit, and that popular respect for a right increases with its duration." In spite of that, law cannot remain unchanging, and the permanence of parliaments is the form into which is translated this continual need for change.

[41] "First Principles," 6th ed., p. 4.

CHAPTER XV

ECONOMY OF TIME AND ACTIVITY

THE BIRTH OF A NEW FORMALISM — TYPES OF THE ARTIFICIAL SIMPLIFICATION OF COMPLEX SITUATIONS — THE INCONVENIENCES AND HARDSHIPS OF OVER-SIMPLIFICATION — MEANS OF RECONCILIATION BETWEEN THE CLASHING INTERESTS OF SPEED AND SECURITY — HARMONIZING RIVAL INTERESTS BY RECIPROCAL CONCESSIONS.

§ 262. *The Birth of a New Formalism.* The legal systems of the western world, inspired largely by the wish to encourage business and the active life, have sought so to arrange the performance of juridical acts, and legal life in general, as to economize time to the utmost, thus making it easier for individuals to act and thereby to create wealth.[1] This is an application of the law of the least effort,[2] which is especially an economic matter. We therefore go no further than to state the existence of this means of reconciling the wide extent of our desires and of our needs, with the forced limitation of our activity contained in the very nature of man.

This very simple idea, that a man should not waste his efforts, has led to very different, sometimes opposite,

[1] See a direct application of this economic idea to the law in the book of *Mataja*, "Das Recht des Schadenersatz nach dem Standpunkt der Nationalökonomie," especially p. 19.

[2] See, on the subject of effort in morals, *W. S. Jevons*, "Theory of Political Economy," p. 49 (1871). As to the law of the least effort, *Winiarski*, "La Principle du Moindre Effort comme Base de la Science Sociale," in RP 1903, p. 288; *Palante*, "La Téléologie Sociale et son Mécanisme," RP 1902, pp. 149ff., with the authors there cited.

conclusions. It from the first gave a death blow to formalism. To surround an act with complicated formalities — the intervention of the parties themselves, witnesses, reduction to writing, the presence of certain third parties—is to establish so many complications which make it harder to accomplish the act. At the same time, curiously, it caused a rebirth of formalism, which, though an embarrassment when it is merely a pompous show, becomes a means of making transactions rapid and sure when it only embodies the essentials. The affairs of the Stock Exchange, of companies, of negotiable instruments, are in consequence surrounded with simple formalities which indicate the meaning of the contract which is involved, such as option market [marché à prime], instrument in the name of a person [titre nominatif], endorsement, and so on. The formalism of words used becomes thus an economy of time, as a telephone number fixes identity. Each term is a flag which covers well-known merchandise. This procedure is peculiarly well adapted to a world of the initiated, such as stockbrokers, merchants, or investors.

This neo-formalism may also show itself in special forms: notably in the contract of adhesion,[3] where the agreement is found to be settled once for all, and is formed frequently by a mere acceptance, without a special offer. The contract may make its appearance not only where the terms used are almost ritual in character, but also in the case of particular documents which are greatly simplified, and often not signed, such as railway or lottery tickets, money certificates, and the like.

[3] [I.e., contracts which depend for their effectiveness upon the acquiescence of persons who have not had a hand in settling their form, either directly or through a representative. The term used by the author seems more descriptive than any English one in common use.—ED.]

The rapidity of transactions makes for clearness, for the simplification of statutes, for precision in the drafting of contracts, and for the simplicity of their wording with reference to known rules, such as those, for example, of York and Antwerp on general average.

§ 263. *Types of the Artificial Simplification of Complex Situations.* The same reason, economy of time and trouble, leads to two great categories of unification, that of things and that of interests. Unification of things consists in considering one thing as principal and the others as accessories — such as accessories to land which become real estate, accessory guaranties, a pecuniary claim accessory to a right in real estate — and in seeing that the act which affects the principal will affect also the accessory. Unification of interests consists, when it comes about that certain interests are identical or of the same sort, in considering them with reference to their common characteristics and in treating them as single. This is the origin of the theories of juristic [moral] persons, of trusts of property held in community, and of group contracts with workmen.

The rapidity of transactions produces consequences in another domain. It attacks all uncertain and inalienable titles. An estate whose owner is uncertain, because its existence depends, for example, on a condition, a possible nullity, or a revocation, is to that extent an impediment to business. An estate which is inalienable or whose alienation is difficult, like the dot of a married woman or the estate of a minor, is another impediment.

Rapidity of transactions requires doing away with the whole scale of the different degrees of impediment to alienation, from simple difficulty to utter impossibility. These complicated situations ought not alone to be made public, as a red light gives warning of an excavation in a city street, but they should also be made to disappear

entirely as soon as possible. It is not enough to notify the public of the danger. It should not be allowed to continue.

Here we have the strongest argument, together with that of security, for the unification of the law of all countries. If all civilized States would adopt a common body of law, if there existed a common law for Europe or for the world, there would be an end to much study and to the perplexing conflicts arising in private international law.

This idea of the economy of forces may lead to measuring responsibility by the degree of fault, the interest of society being to suppress the most serious faults. In any case it will induce rejection of the idea of damages greater than the loss, which seems to be involved in certain combinations.[4]

At the same time this interest of economy of activity, of rapidity in affairs, requires a prompt settlement of all difficulties. This entails a speedy procedure, short periods in which to take legal action, courts convenient to suitors, friendly settlements of disputes as far as possible by compromise, and arbitrations; it entails extinction of obligations by a system of throwing out suits [fins de non-reçevoir] which works quickly, by actual offers of fair treatment, by compensation, by conditions that may render a claim void by operation of law, by rapid methods of getting execution, and by energetic means of pressure. These things are the object logically sought by this interest.

The same idea will encourage the admission of all legal measures apt to discourage fault or to graduate responsibility according to fault, so that serious fault will always be sufficiently punished, especially in proportion to damage, and thus the most harmful acts be

[4] For an example see RDC 1908, p. 689.

discouraged. It will also lead to the presumption of compensation in case of fault, and accordingly to the admission of a right in the insurer or the insured to a claim against the person whose fault caused the injury.[5] It will likewise prevent accumulation of damages to an amount greater than the loss, which would make the accident profitable to the sufferer.[6]

§ 264. *The Inconveniences and Hardships of Over-Simplification.* We must not, however, ignore the fact that this procedure may conflict with other interests, or the intensity of the struggle between this whirlwind sort of law and the other interests which the law holds worthy of protection. The conflict is the more acute because the rule of economy works by piecemeal without a broad outlook, thus causing the neglect of many things.[7]

Rapidity of operations is little favorable to security, in the sense that it is easy to be in error as to certain consequences of the act performed. And the very play of the system renders it impossible to take into consideration individual ignorance. Is it possible to make allowances for a business man's not knowing the rules of the Stock Exchange or the law of exchange, or for a traveler's not understanding his obligations and his rights under his round-trip ticket? The system eliminates, in operation, the individual factor. This factor is also excluded in the case of the individual member of a powerful organism, such as a juristic person, or estate in the hands of an agent. The individual then loses relatively his autonomy of will, he has imposed on him the will of one or several others. "Whoever has

[5] See *Capitant*, RDC 1906, p. 37.

[6] Tribunal de la Seine, May 16, 1908, RDC 1908, 689; Court of Cassation, July 21, 1904, RDC 1906, p. 167; Court of Paris, March 28, 1901, RDC 914; Cassation, Oct. 31, 1906, Sirey 1907.1.345, with note by *Wahl*, RDC 1907, p. 813.

[7] See on the character of the principle of least effort, *Ferrero*, cited by *Palante*, op. cit.

an associate has a master," Loisel has said. One risks, at times, giving up too much of a precious liberty.

The psychological factor, the consideration of good and bad faith, is almost necessarily omitted in this extreme simplification, and in consequence the place which justice might have had in the law is restricted, to the great detriment of public morals.

Commercial law, which has been full of solicitude for rapidity of transactions, has also, from this very fact, been full of the terrible consequences rapid transactions produce, and of attempts to rectify them.[8] The establishment of short periods of limitation for the enforcement of claims may affect the security of anybody. I was not able to verify within three days the packages delivered by a railway,[9] I neglected to notify the insurance company within the period fixed in the policy of an accident which I did not consider serious, I did not protest a note the day after it fell due — in all these cases the knife of the fixed period cuts me off automatically.

§ 265. *Means of Reconciliation Between the Clashing Interests of Speed and Security.* What I would term Americanism in matters of business is a formidable machine of war of a nature to destroy security and to threaten justice. The interest of speed does not appear to be entirely irreconcilable with other interests, but reconciliation is usually the result of sharp strife, whether it be the strife of legislation, of strikes, by leagues of consumers, purchasers, manufacturers; it is rarely reached by friendly coöperation. Let us study these reconciliations.

Note at first that the rapidity of transactions leads to the use of uniform methods for their accomplishment.

[8] See especially the short-time limitations established by commercial law, with regard to the barring of actions in matters of transportation.

[9] French Commercial Code, art. 105.

The tendency to repetition, so well explained by Tarde, is thus accentuated, this being a factor in security. Consequently the spirit of invention is weakened, a spirit which might have brought about a happy adaptation of old rules to new situations. So in business there are archaic survivals in the midst of very modern formulas. Hence a flexible body of rules is called for, to assure rapidity of transactions and at the same time to allow needed innovations. Such a system is better obtained by forms of occupational self-management, such as decisions of trade-union councils, than by statutory regulation, which is always a bit clumsy and ill adapted to temporary or local needs. Here is a way of frequently avoiding too great an opposition between the desire for security and the requirements of evolution.

There are other ways of weakening the conflict between the set of rules by which contracts are to be governed and the requirements of interested persons who may find themselves bound by clauses of which they knew nothing. It may be made the duty of each contracting party fully to inform the other of the meaning of the contract, either by giving him a list of such clauses, or by having, in the companies which propose contracts of adhesion, agents whose interpretation of such contracts, made to the public, binds the heads of the company. Still another method would be to limit the operation of rules adopted to facilitate operations, to the occupational groups affected. Thus interpretations of contracts valid between manufacturers, or between them and wholesale houses, might not apply to the same provisions where the persons interested were an ordinary purchaser and a retail merchant. These last two procedures are of limited application in modern law.

Another way of reconciling security and the rapidity of transactions is to take as a basis not a simple contract

of adhesion imposed by one party on the other, but an agreement established by collective bargaining between producers and consumers, employers and workmen, insurers and insured, manufacturers and their clientèle.

§ 266. *Harmonizing Rival Interests by Reciprocal Concessions.* Methods which, without adopting any particular point of view, take at the same time something from each of the contesting interests, may be counted as among those which make it possible to come near to satisfying both. Thus the law may limit the possibility of leaving situations uncertain, as it has limited the period of redemption,[10] and the period for annulment suits[11] or for actions for revocation,[12] or the duration of entails,[13] or it may limit the scope of conditional rights — all of which would increase security and yet expedite the performance of juridical acts.

In the same spirit, instead of admitting, in a given case, conclusive presumptions which settle immediately the point at issue and thus avoid all loss of time from discussion, it is possible to admit rebuttable, "juris tantum" presumptions, more or less easily disproved. This would be of importance proportional to the need of proof of a matter of good or bad faith. To eliminate such proof is directly contrary to dynamic security, and it may be necessary to consider this point in order to insure rapid transaction of business, without both discouraging honesty and encouraging dishonesty.

Furthermore, conditions containing certain guaranties may be required: for example, clauses excluding appeal to the courts for the enforcement of a certain convention may be forbidden; or only reasonable clauses providing

[10] Civil Code, art. 1660.
[11] Civil Code, art. 1304.
[12] Civil Code, art. 959.
[13] Civil Code, art. 1048.

for the loss of a right may be tolerated; or it may be admitted that certain acts shall be under the control of the courts.

These expedients are clearly not perfect, because, to a certain extent, they act as a drag on all operations which have juridical consequences, but they may nevertheless be acceptable if the drag is not too evident.

CHAPTER XVI

JUSTICE

JUSTICE AS EQUALITY OR PROPORTIONALITY; TANON SHOWS THE VARIABILITY OF THE CONCEPT — THE CONCEPTION OF JUSTICE AS A PROPORTION BETWEEN MATERIAL ELEMENTS — A VARIATION OF THE FOREGOING PRINCIPLE, PAYING MORE ATTENTION TO CAUSALITY — ANOTHER CONCEPTION RECOGNIZES THE ELEMENT OF WILL: RESPONSIBILITY-JUSTICE — JUSTICE AS TAKING ACCOUNT OF ORDINARY NEEDS OF INDIVIDUALS — JUSTICE AS THE SATISFACTION OF PRIMARY HUMAN NEEDS — NONE OF THE FOREGOING CONCEPTIONS CAN BE COMPLETE, JUSTICE BEING A FORMAL IDEA — THE VALUE OF JUSTICE EVEN SO UNDERSTOOD.

§ 267. *Justice as Equality or Proportionality; Tanon Shows the Variability of the Concept.* The expression *justice*, so widely used, so freely invoked in regard to legal decisions and in support of general principles or special cases, is nevertheless not an elementary term, like time and space, beyond which there is nothing more to be expressed. It is at bottom one of those indefinite expressions which are so easy to abuse because they may be understood in so many different ways. It is easy to see how it could have been often an instrument of tyranny over the weak, and how the Romans could have boasted that they always began and ended their wars with justice.[1]

[1] See *De Tourtoulon*, op. cit. p. 150.

The term certainly covers an idea of equality [2] between those who are in an identical situation, or an idea of proportion, which is really reducible to equality between the simple elements of which two quantities are composed[2a]; and it may be said that justice always contains that equality which the traditional scales represent.

It contains also an idea of generality, what Jhering calls external equality, the uniform application to all cases of a rule once established.[3] Every principle, furthermore, tends to its own widest application. Justice is a proportion which naturally aspires to be applied to every case, just to satisfy more completely the somewhat jealous sentiment which is at its base.

Equality, however, is nothing but a relation.[4] The objects to be taken as equal must be fixed upon. It is, therefore, not astonishing that so many divergent conceptions of justice are to be met with among both philosophers and lawyers. There may well be a general agreement to put it above equity, which refers to the solution worked out for a given case, while justice is for all cases.[5] But what then?

For a long time precise definitions of the word have been attempted. For some that is just which causes the pleasure resulting to him who does the act in question to exceed the pain it will give to others.[6] For others

[2] Hence the precision which *Mill* sees in the idea of Justice. See "Utilitarianism" (French ed. p. 96).

[2a] This comes near being the idea expressed by *Rümelin* ("Ueber die Idee der Gerechtigheit," p. 178) and *Alessandro Lévi* ("La Société et l'Ordre Juridique," p. 357) when they say that in all the concepts of justice there is an element of retribution.

[3] "Law as a Means to an End," p. 275.

[4] See on this relative character of justice *Sully-Prudhomme*, RMM 1904, p. 165.

[5] If not, equity is a very vague term. See *Van der Eycken*, "Méthode Positive d'Interprétation," pp. 335ff.; *Bélime*, "Philosophie du Droit," vol. i, p. 502.

[6] *Bentham*, cited by *Oudot*, "Essai sur la Philosophie du Droit," p. 49.

it is equity and charity.[7] Yet others believe that it implies a certain value given to man, without excluding certain persons from securing more.[8] Another view is that it is a certain equality among men in consequence of which every adult reaps the fruits of his own nature and of the acts which are its consequence.[9] Still another is that it is a form of liberty implying a recognition of the right of every man to freedom to act without hindrance and to the advantages derived from his action. It implies a conscious appreciation of the limits imposed by the presence of other men with like rights.[10]

Jhering here, as elsewhere, has ways of looking at things which are both precise and profound. He holds to the preceding conceptions in giving justice a unique content, and in qualifying justice as internal equality, that is, as the fair relation between merit and reward, between punishment and fault[11]; but he develops another quality of justice, generality.[12]

Our contemporaries, however, may be said to have shown themselves more fully aware of the elements of

[7] *Oudot*, op. cit., p. 57.

[8] *Henry Michel*, "L'Idée de l'État," pp. 640ff.

[9] *Herbert Spencer*, "Justice."

[10] Ibid., passim. See an analogous idea of *Kant*, "Metaphysik der Sitten," cited by *Spencer*, ibid. (p. 310 of French ed.). Other conceptions of justice may here be cited. *Landry*, "L'Idée de Justice Distributive," RMM 1901, p. 730, considers that justice demands that everything be ordered in relation to a single purpose, in fixing which only stable sentiments should be considered. This purpose should be economic. *D'Aguanno*, *Archivio Giuridico*, 1907, vol. ii, p. 279, also sees in justice an idea of equality, but one which implies a social object. *Stammler*, "Die Lehre von dem Richtigen Rechte," p. 198 [to be translated in this Series], declares the content of a rule just when in its situation it answers to the social ideal, which is very vague. See *Jean Neybour*, *Revue Socialiste*, 1909, vol. ii, p. 971, who understands justice as complex, being at once distributive and commutative. Compare *A. Lévi*, "La Société et l'Ordre Juridique," pp. 372ff., and *Clovis Belivagua*, "Ideal de Justica" (in "Litteratura e Diretto," Bahia 1907).

[11] "Law as a Means to an End," p. 275.

[12] In another passage he gives another idea of Justice; it "is nothing else than that which suits *all*, where *all* can subsist." Ibid. p. 101.

complexity and variability in the idea of justice. Tanon, in particular, has indicated that the ideas of proportionality, and others of the same sort, are not the whole of its rich and varied content, and that they do not respond to the variety, to the warmth, or to the power of the sentiments aroused by its evocation in the minds of men.[13] It is in this jurist that one finds the completest expression of this very true idea. Other writers use expressions indicating summarily the variability of justice without emphasizing the point.[14]

Before proceeding further in our study of the true meaning of the idea of justice, let us consider the practical application of its principal conceptions.

§ 268. *The Conception of Justice as a Proportion between Material Elements.* The first conception of justice is that of equality based on a material fact, fully capable of appreciation by the senses, and of measurement. It appears in the law in the ancient form of the "lex talionis." It occurs in modern law in the equality of votes in elections; in the equal shares of relatives of the same degree in successions; in the equal division among creditors of article 2093 of the Civil Code; in the division of gains and losses between partners in proportion to their shares; in the division of a decedent's estate into lots for the heirs of the same composition, each containing so much real estate, so much personality and credits; in the distribution of debts in proportion to assets.

Even this conception of equality, however, as the preceding examples show, is capable of differing interpretations. Men differ and so do things, so that equality can be spoken of only by so simplifying every creature

[13] "L'Évolution du Droit," pp. 76ff.

[14] *De Tourtoulon*, "Principes Philosophiques de l'Histoire du Droit," p. 302; *Lévy-Ullmann*, RDC 1903, p. 845; *Colins*, "La Justice dans la Science," vol. ii, p. 359.

and every material fact that only one aspect appears in each. Every human being may be considered solely as human, resulting in an equality so profound that it leads straight to an unrealizable socialism, or to the most radical feminism with its postulate of the absolute legal equality of man and woman. It may be felt, on the other hand, that in every instance a certain special aspect of things must be particularly looked for. The simplest is evidently that of material value, that means by which things can be exactly counted, weighed, or measured: one share of capital is worth another of the same value, one creditor is in the same position as another to whom the debtor owes the same sum (this is the principle applied in the proportional division among creditors established by article 2093 of the Civil Code).

The first conception, that all men are equal, although the easiest to reach, is the one which has the most obscure foundation. This can only be the solution of the mysterious and disturbing problem of the object of life, an object which should be the same for all and equally within the reach of all; or it is a simple compromise between opposing interests which has a good chance of success, because, under its sway, every one who has something will not be too discontented, especially as he reflects that his neighbor has no more. This idea is one of compromise, born of the desire for social peace and of sentiments of which one of the most important is jealousy.

The conception of justice resting on an equality between material things which present an identical character and in principle are of equal value, is, on the whole, no more than a form of the static security of values, considered not singly but in relation one to another. Each value is to increase or diminish in the same pro-

portion. This idea has been, however, little followed in existing systems of law. Where losses arise from the clash of two activities, as in case of accident or even in the non-execution of a contract, the law of the land (unlike the law of the sea) does not know the principle of the division of losses. "Res perit domino" is the idea here still prevailing at the present day. This form of "every one for himself" is nevertheless a narrow conception of security. A breach has been made in this conception indirectly by the principle of occupational risk, which may one day become that of the risk of activity, in virtue of which a person must always answer for injuries resulting from his activity even when he was not at fault. Concurrently with the tendencies already referred to, another has manifested itself in regard to this same point of risk; indeed, in practice, it is readily admitted as a basis for a partial responsibility only. This is what is accomplished by the Law of April 9, 1898, which makes the employer responsible for only a part of the loss caused his employee by a work-accident. The narrow theory of article 407 of the Commercial Code is of like nature. That article provides for a division of liability between the interested parties in case of a marine collision where the fault is hard to locate.

This form of justice is seductive. It takes rights on their most tangible side, that of value. Besides, justice thus understood is not in itself subject to criticism; it is but the corollary of a fundamental idea, of which alone can there be any discussion. That idea is that the interest of society in the conservation or development of economic goods is proportional to their value. It means essentially preservation of acquired situations, and philosophically is part of the great principle of causality: The cause answers for its effects or profits by them.

The question which frames itself is then the following: Must the social extension of this principle be approved? This, again, is one of those questions the answer to which depends quite strictly on the goal assigned to life, which consequently connects itself very closely with an idea which is the attitude of mind of many men. In a more general way, the legal solutions that we term just are those of a reflex justice. Without wishing to poach on others' preserves, I would remark that this is true of most moral rules which are moral because they are good, that is, useful. They are just because they are good. If it is just that a man be bound by his own will, that his declaration of will be construed in conformity with his real intent — if it is just that there be a certain degree of equality among men, the reason is that this is useful, as corresponding to certain ideal views on the meaning of life.

The two conceptions of justice which take into consideration either human unity or value unity have the further advantage of simplicity. They single out a material aspect easy to grasp as a basis of legal relations.

At the same time these principles have but a limited range, for they can only settle difficulties in which persons or rights at issue may be considered from the same angle.

§ 269. *A Variation of the Foregoing Principle, Paying More Attention to Causality.* Another conception of justice is as a relation of equality or of proportion between material elements, involving, however, a more delicate appraisal than in the cases just considered. This idea is more directly subject to the influence of the principle of causality. It may be thought just, for example, to repay one person for the enrichment which he has procured for another. This is the basis of the right of indemnity for expenses borne by a mandatary or

unauthorized agent, or by one who builds on another's land. Inversely, indemnity for injury occasioned to another may be regarded just.

There may be, however, variations on this general theme, that the cause is answerable for the effect. Two different rules may be conceived. He who has caused by his action enrichment or injury may be allowed to claim the actual amount of the increase in value or be obliged to pay the actual damage done. That is to say, his right or obligation may equal the actual change occasioned in another's property. This is the current theory applied to cases of actionable fault or of "in rem versum," or of useful expenditure on the property of another by a possessor or proprietor.[15]

The other rule would compel him to pay over the profit or would entitle him to be recompensed for the loss accruing to his own property by his act; that is, the right or obligation would equal the change in his own property. It has found expression in article 1631, Civil Code, which, in case of total eviction, guarantees the return of the entire purchase price by the vendor to the purchaser regardless of the actual value. It is also partly involved in article 1184 of the Civil Code.

Which of these two conceptions of justice is the better depends on the general position which the legislator has taken. If he makes the extent of the rights and obligations of the actor depend on the change which has been wrought in another's property, it is because he desires to strengthen acquired situations by guaranteeing them against injury, and by granting indemnity to the actor only where there has been enrichment as a result of his action and to the extent of such enrichment. This is static security, or at least a static right.

[15] Civil Code, arts. 861, 1437.

If the juridical situation is made to depend on the enrichment or on the impoverishment of the actor, action is the consideration in view. The object is to induce action for the enrichment of another, and also, in another aspect, as far as possible to discourage action which will impoverish another. Such a regulation of action would be sufficient except for the imprudence of men, which is normally to be expected, when it is not excessive.

§ 270. *Another Conception Recognizes the Element of Will: Responsibility-Justice.* This manner of interpreting justice which is concerned only with causality, and which is therefore wholly objective, serves as a natural transition to conceptions of justice founded on an intellectual element.

One may conceive justice as establishing an equality between the intensity of the will of a person and the good or bad legal consequences which flow from it, so far as he is affected by them. According to this conception good will is recompensed: the manager of another's affairs should be paid or at least indemnified even if the enrichment has disappeared; he who had a normal will, and believed that he was acting within his rights, should be indulgently treated even where he has deceived himself.

The inverse consequences are, however, much more important. The question here is as to the legal results of states of will which have had bad consequences. If the individual willed the act which resulted in damage, if he wanted to cause the injury, he will be fully responsible; if he willed the harmful act without foreseeing all its consequences, he will be less so. If the injurious act was not directly willed, but resulted from imprudence or negligence, the responsibility will vary with the gravity of the fault, with the degree to which the actor

has deviated from what he should have done or not done. Responsibility ceases to exist only where the injury could not have been helped, by reason of some material or personal necessity, that is, in the case of vis major or insanity. This notion of justice is embodied only very roughly in the Civil Code. It is approximately contained in such dispositions as article 1150, according to which an individual who does not carry out his contract is differently treated with respect to his good or bad faith,[16] or in the classical distinction between grave and slight fault in the case of depositaries, agents, or others.

More exactly, when has private law judged it expedient to establish this concordance between a certain state of mind freely willed and its material results? Three principal cases may be distinguished: a good intention, an evil intention (or at least fault), and "force majeure."

Where the intention was good the law takes it into consideration in many cases. Where the intention was to render a service to another, it sets up an implied agency. Good faith is taken into account in the acquisition of personalty, article 2279, Civil Code; in that of real estate by prescription, article 2265, Civil Code; in the acquisition of profits, article 549, Civil Code; in case of plantations on the land of another, article 555, Civil Code; of the non-execution of obligations, article 1150; where third parties ignorant of the revocation of the agency have treated with an agent, article 2005, Civil Code, or with a bankrupt in ignorance of his cessation of payments, article 448, Code of Commerce.

All these dispositions, however, work only relative justice; they do not proportion the recognized advantage

[16] *Hildenburg*, RC 1901, p. 26, has a different theory, applying better the idea of justice. He considers solely the responsibility of the individual.

to indisputable or apparent good faith, and they are far from giving all that good faith would require. Good faith alone does not always suffice to acquire ownership in property, real or personal.

From another point of view, though the law treats bad faith with greater severity in the cases cited, though it compels the person at fault to pay damages, sometimes even punitive damages, these are but the rules of a relative justice. If some one must suffer from a fault the law prefers that it should be the person at fault, but the injury is not proportioned to the fault. Even punitive damages, though in proportion to the fault, profit a person who ought not to have the profit they imply. Going further, the law even permits the stipulation in contracts of liquidated damages differing from the actual loss.

The law truly pronounces justice in only one class of cases: where vis major has prevented the execution of an obligation and the person obligated is freed. This rule, however, is nowadays limited by the distinction which there is a tendency to draw between chance and vis major.[17]

How shall we explain the limited application of this responsibility-justice, which has the advantage of favoring the increase of social wealth and of serving the interest of all by encouraging men to help their neighbors and by discouraging any attempts at injury? It comes from the greater consideration which the legislator gives to other elements, and from the fact that when he appeals to this kind of justice he amalgamates with it justice measured by the injury done another. Finally, in many hypotheses, like those based on the advantage procured for another, there is no definite system.

[17] On the distinction between chance and vis major, see *Bourgoin*, "Distinction du Cas Fortuit," thesis, Lyons 1902.

Nevertheless the little room made for this idea is astonishing in view of the fact that here is to be found a sufficiently simple conception of justice, agreeing therefore with the ideas of economy of means and security. Fault, though a wholly subjective idea, is here treated objectively. All men are looked upon as equally intelligent, equally able to understand the possible material situations which will result from their inaction or imprudence, and equally capable of effort or of resistance to evil temptation. Only children and the insane are excepted.

This is not, however, the only possible conception of justice from an intellectual point of view. It is possible to advance to that background of individual responsibility, not altogether forbidden to psychology, which is too elusive to serve as a basis for anything but for decisions of particular cases, or for a special class of consequences of the statute. Examples are a law for workmen different from that for employers, a criminal law varying the punishment with the rank of the convicted official.

It is possible to imagine rules of responsibility different according to the social condition of individuals, so as to approach nearer to the real degree of development of their faculties. Quite possibly industrial and social legislation will develop along this line in the future.

§ 271. *Justice as Taking Account of Ordinary Needs of Individuals.* There is another and last conception of justice, that which takes into consideration the needs of the individual.[18] This idea, according to the interpretation given it, may vary from accentuated subjectivism to very pronounced objectivism. The needs of the individual may be simply strong national or social tastes, innate or acquired, or on the contrary they may

[18] *Picard*, "Le Droit Pur," p. 406.

vary in the highest degree according to individual, environment, or the age. Justice thus conceived, which seeks to procure equal satisfactions for all, can hardly influence the law; it has too uncertain a basis to be the criterion for anything but very special dispositions. To determine it is then the judge's business, as in the case of alimentary pensions (art. 208, Civil Code).

Instead of adopting the theory in full it is possible to adopt a mixed system and to decide that justice requires special rules for each social class, in view of the ordinary needs of that class. This rule is still very vague, although it has been applied in some important dispositions of the law: such as the admission of any sort of proof in commercial matters; the dispensation with certain formalities in regard to notes of hand in respect to certain persons (art. 132, Civil Code); the priority of right of workmen for their wages, of employees for their salaries, or of workmen for their temporary indemnity (art. 2101, no. 6); the right of the victims of a work-accident against the guaranty fund (Law of April 9, 1898, art. 24).

§ 272. *Justice as the Satisfaction of Primary Human Needs.* The extreme of this conception of justice is the idea that every one should be able to satisfy his primary needs. Existence should be guaranteed. This idea is at the base of the exemption of a minimum of existence with respect to taxes. It underlies a large part of the law applying to the laboring classes. The workman should have the indispensable; hence he is entitled to indemnity in case of a work-accident, to a retirement pension; his health must be protected (Law of July 12, 1893); he must not be overworked (Law of July 16, 1907 on one day's rest in seven). Further, every one should be able to get credit for lodgment and food, so a special right is granted with respect to

lessors and to merchants (arts. 2101, no. 5, and 2102, no. 1, of the Civil Code). A poor person should be in a position to enforce his rights, hence legal aid for the poor. The aged worker should have a pension (Law of April 6, 1910), and so should all old people and invalids.

This way of understanding justice, which has assumed so much importance in recent laws, is a theory not unrelated to that of an equality-justice complete for all men. Both have the same foundation—human life is respectable in itself, it should always be respected. Justice in proportion to need, however, admits an attenuation. It does not draw the inference that men are equal, but that they should all have enough to live on, while certain among them may have special advantages. It is, then, a compromise theory, making only a limited application of the idea of justice, and admitting, alongside it, a certain application of the principle, "to every one according to his works."[19]

§ 273. *None of the Foregoing Conceptions Can be Complete, Justice being a Formal Idea.* Looking over this group of conceptions, we see that on the whole no one of them can be exclusively adopted. Not only would certain among them lead to inacceptable con-

[19] These different conceptions of justice are for the most part already indicated by *Tarde*, "Opposition Universelle," p. 413. "Justice includes an idea of equality between persons in an identical situation. But while it contains a stable, it contains also a variable element. What will be the characteristic of that identity of situation? In the law of talion, it is the material fact of a certain wound which calls for an equal wounding. Some call it the aspiration for the same things: equality among consumers, equality among those who need the same things. Others again say that it consists in the fact that these identical needs are felt by persons who have the needs to the same degree; to everyone according to his needs. For others, finally, it means that each consumer has work of equal value; to everyone according to his works." On these manifold conceptions of justice, compare *John Stuart Mill*, "Utilitarianism," who is far less precise.

sequences, like complete equality among men, but no one may be applied to every case. This is natural enough. Justice consists especially in extracting from the various situations which present themselves a character judged fundamental, and in determining the solution of each case according to the more or less important rôle which this character plays therein. This fundamental character is not necessarily to be found in every hypothesis. Every conception of justice then risks being narrow, because it takes up only one aspect of things and is of limited range. It is therefore natural, even necessary, in thinking of justice, to have in mind several conceptions at once. But then the difficulty arises that as no one of them has its distinct field of operation, in certain cases two conceptions will come into conflict. How shall a choice be made? If the legislator recognizes these difficulties, he will be led to decide according to general conceptions, in which will be reflected something of his taste for calm or for activity. To allow a value to man as such, to indemnify all injuries, to regulate the conflict of interests according to their relative values, is to favor acquired situations. To encourage or punish the will behind the deed is to press toward the adoption of a given rule of conduct. Mill was to some extent of this same opinion, when he said that there must be an outside principle to be applied to the conflict of various conceptions of justice. For him this outside principle was social utility,[20] which shows itself in a form more imperative, more absolute, than those conceptions.

In treating of this much used and abused idea of justice, one thing, in our opinion, should be kept in view. Justice is a mold in which many ideas may be run. It is a secondary idea. When a first principle has been estab-

[20] See "Utilitarianism."

lished it may be applied with justice. After saying that men must act prudently, we may bring in justice to complete the thought, and add: When a person has committed an imprudence he shall be penalized in proportion to its gravity. If a tax is a payment for services rendered by the State, justice consists in making the tax proportionate to the advantage received. If a tax is a sacrifice required by the common interest, a just tax should be progressive, calculated on the amount which each person can give without too much trouble. In regard to the same institution, justice may be as varied as are the conceptions of the purpose of that institution. There are as many kinds of justice as there are conceptions of an institution.

When the end for which an institution exists has been recognized, the institution may be organized on either of two systems. The proportion may be established in which the individual has acted either conformably with or in opposition to such end, or this proportion may be wholly disregarded. The first system would be just, the second unjust.

After all in what does justice consist, unless in complete comprehension of an end? If the principle be established that in every society imprudences must be avoided, it is logical to punish imprudences in proportion to their gravity.

The idea of justice, thus emptied of the variable content which it may be made to contain, seems no more than a corollary of the principles which have been adopted as a basis. It is thus unseated from the high place which has been so freely assigned to it, to take its place in a lower rank.

Still, though only a form, it might yet be of great importance, if it were the mold in which all social conceptions might assume a practical form. In fact, and

here is where the trouble begins, each idea of justice can cover only one aspect of a situation at one time; so, since this aspect may not always be present, a single conception of justice does not apply to every situation. Several must be applied at the same time, and this ordinarily leads to a conflict, which is, however, rather a conflict of principles that one wishes to apply justly than of opposing ideas of justice.

There will very evidently come about during the struggle a reconciliation between different conceptions of justice, a toning down of their differences. At a certain moment a modus vivendi will suggest itself, and will spread rapidly, thanks to the instinct of imitation. It is in this connection, says Tarde, that jurists can work advantageously in the interest of society. For "They do not treat social questions from their most unyielding, most abrupt side, that of theology: desires, needs, wills, sentiments often born in struggle. The jurist christens all of these *rights*, things always considered to be in accord; and starting with the accredited principle which he always finds at some moment, he easily decides what is just by a method of deduction resembling that used in geometry. The only difference is that geometrical atoms never vary, while legal axioms change slowly."[21] In spite of the great element of illusion contained necessarily in every hope too formal in its expression, this hope does contain a considerable share of practical truth, for happily these conflicts do not always seem as sharp as they might be thought.[22]

[21] *Tarde*, "Opposition Universelle," p. 415.

[22] At any rate this shows us that it serves very little purpose to have proclaimed with *Izoulet*, "La Cité Moderne," p. 429, that "The identity of interest and justice is the fundamental truth which must be considered unquestionable," that "Justice is the supreme interest." If the idea of justice is so many-sided, how can it coincide with interest, and with what interest does it coincide? The real ground of conflict is far from these principles of preaching or practice which are so complacently repeated.

§ 274. *The Value of Justice Even So Understood.* Does justice, even so understood, as a formal concept useful to complete others, deserve the importance which has been assigned to it and ought it to have the first place? Does it owe its reputation solely to the fact that by serving indifferently for the practical application of all the great ideas which form the ideal of humanity, it shines with a light that is merely a reflection of their glory?

Its own peculiar virtue, in the last analysis, lies in an idea of equality. But, as Jhering says, "Does not the love of equality have its root deep in the most shameful emotions of the human heart, ill-will and envy? Let no one be happier than I am, and if I am miserable let everybody else be miserable too."[23] That human solidarity requires a certain equality is not a sufficient answer to this. There is a higher ground, a possible answer: that it is desirable that humanity as a whole develop and be happy. Here is an elevated postulate of order which may serve as a support for the idea of justice.

Justice, however, even stripped of all its variability and complexity, and reduced to the idea of proportionality, collides with other ideas. One collision may be with the principle of economy of means. Justice so conceived may be too complicated to suit the demand of practical life for rapidity and so must be abandoned. Hence the tendency to eliminate in many cases the distinction between good or bad faith, which, though just, is like all pyschological questions the cause of many lawsuits.

If justice be conceived in another light, it may yield solutions often in accord with security, for they are based

[23] "Zweck im Recht," French ed., p. 245. [See chap. xii, footnote 133, p. 416 ante.— ED.]

on precise elements whose relative importance is clearly reflected in the effects produced. Justice at the same time bends to a great extent to change, for its basis may be existing as well as past facts.

Furthermore, justice, taken provisionally in the sense of proper proportion of merit, cannot always be completely realized, so that the law must often choose the least unjust of two solutions. So when an accident has resulted from a slight imprudence, it must be repaired by him who was imprudent, even if he will be much impoverished in consequence; such a result will be less disturbing than to make the victim bear the loss. But is it really just that slight negligence should call for an enormous indemnity?

To consider a final trait which completes the rôle of the idea of justice, its egalitarian[24] tendencies are not everything. Like all egalitarian ideas, they satisfy persons who aspire to a peaceful, pleasant life, but such a life is not entirely possible. Only by fighting, and by fighting hard, can peace be assured; so there will come moments in the life of societies in which justice must be rated cheaply. Montesquieu said that the statue of Liberty must at times be veiled; so, we add, must that of Justice, when revolution is abroad in the land. Moments come when it is necessary to pursue and punish a few persons in a mob with a severity disproportionate to their share of responsibility. Such is the case in strikes marked by violence. Such a measure is unjust as not corresponding to the degree of responsibility of the persons condemned; it is unjust as lacking that external equality of which Jhering speaks, according to which all persons in the same situation should be equally treated. Nevertheless it is necessary and to be

[24] [Or "equalitarian"; which form is the better English being a disputed question that only the future can settle.—ED.]

commended. Sometimes one must cut to the quick, surgical operations must be resorted to if greater evils are to be escaped. This men of action well know, though expression of their opinion is less frequent than that of men of thought who heap book on pamphlet by their writings on the happiness of humanity.

When must justice be thus sacrificed? Where can security be found if justice is to be sometimes abandoned? There is only one answer to this difficult question: to hope that the cases will be few, but when they arise never to hesitate to treat them with suitable energy.

CHAPTER XVII

EQUALITY

EQUALITY AS RESTING ON POSTULATES, NOT ON DEMONSTRATION — EQUALITY AN ACCEPTABLE COMPROMISE FOR OPPOSING CLAIMS — RELATION OF EQUALITY AND SOLIDARITY — ITS RELATION WITH SECURITY — ITS RELATION WITH LIBERTY — EQUALITY AND DIFFERENTIATION.

§ 275. *Equality as Resting on Postulates, Not on Demonstration.* Let us take words in their common meaning and study justice in that special form called equality.

We have no desire to attempt its history and to show how the special forms peculiar to occidental society brought on its development, why it was revealed for the first time to the aging Græco-Roman civilization, then to modern Europe and young America. All this has been learnedly studied by others.[1]

The egalitarian idea so important in modern times, the basis of so many institutions of both public and private law, is founded on the fact that men are all exposed to suffering. Equality of intelligence or of merit among men does not exist.

Without doubt, to examine the matter more closely, men have not all the same capacity for suffering, and suffer unequally from the same circumstances. But they do all suffer. And it seems only natural that, in the face of a certain similarity among men established

[1] See *Bouglé*, "Les Idées Égalitaires," part ii.

by nature, society should establish one likewise. Since every man has capacity for suffering, it is natural that the advantages of life be equally shared by all, so that all will suffer in the same proportion. It is even natural that, responding to a sentiment of pity for our fellows, society should be so organized as to give special advantage to those who suffer the most, the sick. Equality thus understood is an acceptable postulate. The eminent dignity of man may also be mentioned — it may be affirmed that men in association have a value in and for themselves; it may be said that the first principle of egalitarianism is that humanity has a value of its own.[2] But it is questionable whether the biped form that characterizes the human species is enough to give the lowest grade of human being a right to equal treatment, except to assure his right to live; in any event such an admission is merely to make a postulate.

Aside from these justifications, which rest on postulates, although that is no reason for rejecting them, there are no satisfactory explanations of equality. To found equality on nature is to say that we should imitate nature, but why should we? Furthermore, we are coming to see more and more that there is no equality in nature, which is, on the contrary, the reign of inequality and of strife without quarter.[3]

The final reason for the theory of equality is the belief that every man is called to a certain future, which implies a metaphysical belief or the admission of certain postulates. In spite of their value, then, egalitarian aspirations are capable neither of scientific proof nor of disproof.[4] Equality may, however, be based on a negative idea: there is no reason why one man should

[2] *Bouglé*, op. cit., pp. 23ff.

[3] *Dunan*, "Les Principes Moraux du Droit," RMM 1904, p. 715.

[4] *Bouglé*, "La Démocratie devant la Science," RMM 1904, p. 65.

suffer more than another. But this argument hides the difficulty; it supposes, in order to treat men equally, that equality in the absence of anything else should be the rule. It would be no better to base equality, with Leibnitz, on the need for symmetry. Though the beautiful may respond to a need of man or of certain men, it must give way before stronger reasons, and there are often practical considerations incompatible with elegance in the construction of society.[5]

§ 276. *Equality an Acceptable Compromise for Opposing Claims.* Ideas of equality are nevertheless a great force, which must be reckoned with; they rest on that jealousy which, regrettable as it is, still exists and cannot be forgotten. Besides, as between opposing pretensions, equality appears as a compromise acceptable to all; no one side loses too much even it it does not get everything it desires. Finally social equality fortifies its argument with the unworthiness of those who enjoy social advantages and do not pay back to society a proportionate return. From the political or civil point of view equality is often the result of the insufficiencies of aristocracies or of chiefs.

Based chiefly on suffering, the common heritage of all men, equality takes a more definite form than that imponderable thing, the suffering caused or to be caused to each individual by a particular evil. It becomes necessarily objective equality, measured equality, like that applied in universal suffrage or in the intestate succession of children to their parents' estates. We shall study this sort of equality, the roughest form of justice.

§ 277. *Relation of Equality and Solidarity.* Equality seems to us in accord with solidarity. In the numerous cases in which there seems no more reason why one party

[5] *Jhering,* "Zweck im Recht," French ed. p. 245.

should bear the loss than the other, solidarity and equality lead to the same or to the same kind of solution. When the problem is to decide who shall suffer the loss arising from chance or from one of those slight faults which every one is almost sure to commit at some time, they lead to a division of the loss between the interested parties instead of putting it all upon one. This is notably the case with the law on work-accidents. Little consideration was paid to any such principle by the old law, imbued with respect for acquired situations, which proclaimed the principles "res perit domino," "res perit creditori," no damages need be paid for non-fulfillment because of pure accident or vis major (article 1148, Civil Code). Such solutions would be repellent to-day. For the tendency of the courts is to give damages for every injury, but in a sum less than the loss, thus roughly evening up the parties. The decisions admit in principle that joint tortfeasors should share the liability even after one alone has satisfied the loss.[6]

§ 278. *Its Relation With Security.* It would be superfluous to add that equality has the advantage of being in accord with the law of the least effort. Its simplicity, its comprehensibility, are among the principal causes of its success.

On the other hand, equality ill accords with static security. How can a person feel secure when he knows that an inequality happening by chance to-morrow will be at once effaced? Bentham noted this,[7] but he also called

[6] *Baudry* and *Barde*, "Obligations," ii, no. 1305ff.

[7] "Principles of the Civil Code," ch. xi. [This reference is to the French work, first published in Paris in 1802, based on manuscripts handed by *Bentham* to Dumont. Recently an English translation by C. M. Atkinson has appeared at the Oxford University Press under the title of "Bentham's Theory of Legislation" (2 vols., 1914). The reader is referred to the first volume of this work, "Principles of Legislation and Principles of the Civil Code."—Ed.]

attention to the point that time might bring about a certain reconciliation between the opposing principles. The day on which the owner of the right has disappeared and the property is vacant, equality may without inconvenience be restored between that right and others.[8]

On the other hand why should not dynamic security imply that privileges may be acquired by certain persons, even if the result might be inequality? To encourage action, should there not be the recompense of security?

Again, and so ideas become mixed, equality is maintained to be a stimulant to action, in the sense that if the law promises equal rewards to all it may count on greater devotion. [9]

§ 279. *Its Relation with Liberty.* Consider the relations of liberty with equality. It acts in a different sphere. It is, like security, a means, while equality looks only to final results. Liberty tends to a certain inequality, but while it implies the corollary of the absolute maintenance of a certain sphere of activity and certain advantages for everybody, definite limits are set to inequality.

The will, which, however, may be weakened by circumstances (for their examination and especially for the study of economic influences I refer to the theory of the will) is another means calculated to destroy equality. Juridical situations, which flow partly from acts of volition, differ because everyone has not the same will. To a certain extent, it is true, there is equality because each person has that which he willed; but such equality is only apparent. Wills do not all take shape at the same moment; some are earlier, some later, so that only he who comes first can get what he wants. Therefore the ruling principle of the law of mortgage, "prior tempore

[8] Ibid., ch. xii.

[9] See *Jhering*, "Zweck im Recht," French ed. p. 246.

potior jure," is just as true in the law of obligations, in that a certain advantage is given to him who first accepts an open offer, begins negotiations, receives payment, invokes a lease, takes possession of a movable which has been sold (article 1141, Civil Code), declares the sale of a credit (article 1690), applies to have the date fixed of a document not made before a notary (article 1328).

In sum, equality is a theory of results, which, if not pushed to an extreme, now collides with, now favors, the other great tendencies which dominate the law. But it is not only restrained by their opposition, it has its own peculiar limitations. It applies naturally to cases in which there is a loss or a profit to divide among several persons and there is no other basis of adjustment, such cases as the division of losses, of debts, or of an inheritance. But what use shall be made of it in another field? How could the theory of equality be of value in settling questions of the formation of contracts, of the obligations of buyer or seller, or workman or employer, of the authority of precedent?

§ 280. *Equality and Differentiation.* This last point seems to us very important, for while the old inequality of castes has disappeared, manifold distinctions are being established among men by the division of labor and occupational differentiation. Some see therein such great complexity that they conclude for an approximative equality, for at a given moment one ceases to see a situation so sharply defined as to classify men in unequal categories.[10] This equality is socially true in large measure. Differentiation establishes a situation which is neither equality nor inequality. But it must be observed that many circumstances — profits, salaries, honors even — often bring different things into

[10] *Parodi*, "Notion d'Égalité Sociale," RMM 1908, pp. 857ff.

the same class — that is to say, create an order of inequality.

From another point of view, the legal one, differentiation really means leaving the sphere of equality or inequality. These are in fact two distinct zones. Differentiation calls for a regulation adapted to the social object pursued by each of the persons in conflict. Here is a field for skillful compromise through the law. It is not a question of establishing equality — that would be nonsense — between employer and workman, between manufacturer and consumer, nor of who should command, who should be the master of the bargain; rules must be made adaptable to the ends which persons pursue each in his own way, whether these persons be considered from a professional point of view or not. This does not imply that the problem can always be completely solved; in this trait it is like many others.

We feel that we are now in a position to affirm with more force that the idea of material equality can be only a rule of limited extent, and good only when nothing better can be found, even when its conflicts with other ideas have been settled.

CHAPTER XVIII

LIBERTY

SUPERFICIAL AND PROFOUND REASONS FOR ITS IMPORTANCE — VARIOUS CONCEPTIONS OF LIBERTY: (1) LIBERTY AS A CONSEQUENCE OF LIMITATIONS ON THE POWER OF LAW; (2) LIBERTY AS A DOCTRINE OF DESPAIR; (3) LIBERTY AS THE INTEREST OF THE INDIVIDUAL; (4) LIBERTY AS A SOCIAL IDEAL — THE INFLUENCE OF CONCEPTIONS OF LIBERTY IN PRIVATE LAW — DERIVATIVE CONCEPTIONS IN THE LAW OF OBLIGATIONS: (1) THE AUTONOMY OF THE WILL; (2) RESPECT FOR THE SPHERE OF ACTIVITY OF OTHERS — LIBERTY AS A BULWARK FOR STATIC SECURITY — LIBERTY, WITH RESPECT TO THE DURATION OF JURIDICAL SITUATIONS — LIBERTY AND RESPONSIBILITY.

§ 281. *Superficial and Profound Reasons for its Importance.* It is hardly necessary to say that liberty occupies a very large place in the law, as well as in history and in the life of society. The reasons, however, why it has proved so seductive to the masses at certain periods do not correspond exactly with those from which it draws its real value,[1] as we shall see in studying it not from the point of view of positive law [2] but from that of the legislator.

Liberty has proved seductive as the antithesis of the conditioned, the complex, which is the ordinary fact of

[1] See the vague definitions sometimes given, cited by *Schatz*, "Individualisme," p. 199.

[2] It is thus alone defined by *Montesquieu*, "Esprit des Lois," Book xi, ch. iii.

human existence. It answers to the notion of a reaction of the ideal against the facts of positive life, which the human mind finds itself powerless to dominate completely. Each individual imagines that under a régime of liberty he can realize his dream; this is particularly true of those who think of the consequences of liberty by adopting their personal points of view — the consequent increase of their personal activity, or the widening of the zone in which they will be left to the enjoyment of tranquility. Persons, on the contrary, who are interested in the general consequences of liberty, frequently believe that it will result in greater equality; they do not see that it may very possibly bring about an absolute inequality in results, and not even a development proportioned to the objective merit or to the objective worth of the individual. Such an argument in favor of liberty offers a rather specious raison d'être.

The profound reasons which really give value to this word *liberty* are numerous but quite different, and lead to certain conceptions which we shall study in this chapter.

§ 282. *Various Conceptions of Liberty.* 1: LIBERTY AS A CONSEQUENCE OF LIMITATIONS ON THE POWER OF LAW. Liberty may, according to a first opinion, rest on practical necessity. Society, finding itself unable to assure the application of certain rules which it considers good, may leave everyone free to follow them or not, and very wisely, for nothing so lowers the standing of the law and of the law-giver as to make rules which cannot be enforced. But such a doctrine is very delicate in its application. I have already shown that law and not-law, if not two entities, are at least two extremes between which lie a thousand intermediates. At what point, and how often, can the legislator hope to translate his will into a law sufficiently alive to make it worth while for him to interfere?

Unfortunately this conception plays but an insignificant rôle. The legislator is too much impressed with his own importance to recognize the limits which facts stronger than statutes set to his powers. It is easy for him to believe not only that he is all-knowing but also that he is all-powerful.[3]

The only advantage of a belief in the omnipotence of law, a belief disproved by the facts, is that it encourages the hope of seeing the realization of an ideal, that most tenacious of human needs; and it presents the disadvantage of developing the need for law-making to excess and of bringing forth many laws stillborn or entirely ineffective because unenforceable.

2: Liberty as a Doctrine of Despair. Others see the foundation of liberty not in a rebellion against the narrow wills of the authorities, but in the incapacity of our minds to agree on certain fundamental points. Liberty is a doctrine of despair; society, unable to create a general ideal on certain points, leaves the individual free to create his own. So it is with religious liberty, with the different kinds of liberty of opinion. That the truth may not be recognized as such by all men is a fact which cannot be lost sight of, and a doctrine founded upon it has at least a serious basis.

Other theories of liberty are not simple deductions from accepted facts, like those which we have been discussing, but are bound up with particular conceptions of life, to the practical realization of which liberty is necessary.

3: Liberty as the Interest of the Individual. Certain persons who hold to the principle that the end of life is the satisfaction of the interest of the individual, thus understanding the general interest as the sum total of actual particular interests, deduce the principle that the object of the law being the protection of individual

[3] See *Cruet*, "La Vie du Droit," p. 17.

interest, it should recognize that each individual is best able to tell what will suit his advantage or his pleasure. He should be free, in order that he may be permitted the pleasure of getting what he wants, by the methods which suit him. Liberty thus appears to have a value in proportion to the pleasure which it brings. Such a theory will logically lead to unlimited liberty.

4: LIBERTY AS A SOCIAL IDEAL. Liberty may finally be looked upon as simply a means of realizing a social ideal different from the pleasure which comes from the free choice of the nature and manner of one's activity. Its advantage may be held to lie in the consideration that it excites activity to a high degree. Unrestrained, delivered over to the competition which liberty may provoke, to the risks which come in its train, activity is multiplied and developed, the ideal of materialism is attained: greater production, more sales, more enjoyment procured for everyone. The intellectual ideal of the struggle of ideas is another result.

The value of this conception of liberty is very hard to determine. It assumes an acceptance of the ideal of the greatest possible activity, an assumption which contains a postulate and which depends largely on individual tastes. Furthermore, this conception of liberty divides into two branches. Liberty may be desired as the mother of competition, that is, of an almost equal struggle — a conception which will lead, by combining liberty with the desire for equality,[4] to the exclusion of liberty when it ends in monopoly and in excessive concentration, for it must not be forgotten that monopoly and competition are fruits of the same tree. Or liberty may also be desired because the best will prevail in strife. This,

[4] On this mingling of the ideas of liberty and equality, see *Parodi*, "Liberté et Égalité," RMM 1900, p. 381. He conceives liberty only as sufficiently limited that the liberty of one cannot actually destroy that of another.

however, is only a half-truth, and it causes the rejection of liberty in many cases.

§ 283. *The Influence of Conceptions of Liberty in Private Law.* In the sphere of private law, and more especially in that of the law of obligations, these last two are almost the only conceptions of liberty which have any influence.

Liberty as a doctrine of despair has hardly more than one application; it furnishes a limitation based on public policy, which is protected by article 6 of the Civil Code from the derogatory influence of freedom of contract. Public policy is the sum of the ideas which society believes to be true and has very clearly adopted as final by repelling liberty at whatever point truth is believed to hold its own. This results in the variable character of public policy. It varies with the more or less clear, more or less inclusive ideas of the public authorities, who do not admit that their way of regarding things is a sentiment, but never accept the possibility of anyone else having a different sentiment. The French theory of public policy is variable, except when the law is carefully phrased in order to satisfy the need for security; thus social change is favored in what is perhaps an exaggerated and dangerous fashion, for the security of transactions may be affected.

The social ideal, however, essentially complex as it is, implies the play of several ideas whose influence must be relative, and from this classification it results that the limitation on liberty called public policy varies in its effect according to the case; from the point of view of private international law, for instance, there are both an absolute and a relative public policy, and in municipal law there are distinctions to which we shall later refer.

Likewise, the doctrine of liberty as an assertion of the impotence of authority has influenced article 1142 of the

Civil Code, providing for damages for breach of obligations to do or to refrain from doing certain things.[5] — at least if the article be understood as applying only to cases in which a satisfactory execution is not materially enforceable.

§ 284. *Derivative Conceptions in the Law of Obligations.* 1:. THE AUTONOMY OF THE WILL. Conceptions of liberty as a means of realizing a social ideal, however, are especially important in the law of obligations. They are the inspiration of the two great liberal principles of the autonomy of the will and respect for the sphere of activity of others. With them is bound up the idea of limitation in time of the effects of juridical acts.

The principle of the autonomy of the will is one of the most important in private law. Through its action, an individual is under obligation only when he has so willed, and possesses rights only to the extent that he has willed their possession. To this idea is related, outside the sphere of obligations, the principle of freedom in the creation of rights in realty (article 686, Civil Code), but especially, in the matter of obligations, freedom of contract, a principle of immensely wide application. It not only permits individuals to determine at their pleasure the effects of juridical acts, and thus to create innominate contracts, but it allows them to regulate as they please the formation of contracts, and their mode of extinction, whether by payment, by compensation, or by prescription (in shortening the period, for example), and even, to a certain degree, their method of proof.

The antonomy of the will is also at the base of that method of interpretation of obligations which consists in seeking the common intention of the parties (article

[5] According to this article, these obligations in case of non-performance are satisfied by paying damages.

1156, Civil Code), for it ends in giving force to a tacit will in the absence of an express intention.

If, however, the conception of liberty as the satisfaction of everyone's desires leads to the admission of a very large autonomy of will in juridical acts, it also facilitates modifications and suppressions of juridical situations established by the will of the contracting parties, without regard for third parties who may have depended on the continuance of a state of fact juridically established for a given time. In this theory the compromise between security and that liberty which forces the admission of everyone's right to realize what he wills in spite of what he willed previously, comes about by considering as irrevocable only that expression of will which has been recognized by others through acceptance, and to the extent to which third parties do not renounce the advantage of the right which they have acquired. A contract is not revocable by the will of all contracting parties, but it is always so if all agree. This is a solid, clearly defined conception, but it is somewhat narrow, and does not make room either for the necessity of modifying certain contracts unilaterally or for that of taking into account the calculations of third parties — as if every established right were not a social fact whose effect travels from one person to another!

If liberty, however, be conceived as a goad of competition, that social ideal of strife with nearly equal weapons naturally leads to self-restriction. The accepted point of departure induces the rejection, as against public policy, of contracts which give birth to real power; trusts, contracts which put one party at the mercy of the other, who is made judge of certain points, who may order or break at his own pleasure. The colorless article 1129 of the Civil Code which requires a determined or at least a determinable object may,

under this theory, take on a more cavalier air and serve as a weapon against many clauses.[6]

In any case the autonomy of the will only brings us to the establishment of relations between contracting parties.

2: RESPECT FOR THE SPHERE OF ACTIVITY OF OTHERS. The same idea of liberty has inspired a second and no less important principle, that each individual should respect the sphere of activity of another.[7] The consequences of this principle are numerous and varied, and may be found in several doctrines of private law, the chief of which may be briefly indicated. A money obligation to the creditor's advantage cannot be created against his will, except in very special cases (article 1121, Civil Code). The owner cannot be compelled to pay for a building constructed on his land without his order (article 555, Civil Code); an implied agent cannot bind his principal except so far as acts of conservation are concerned. According to this theory a third person cannot be bound without a proper power, and then only to the extent of the power. Likewise a person promises to act only under the sanction of damages: this is what article 1142, Civil Code, provides by saying that obligations to do or to refrain are canceled by payment of damages. So a promise for another does not bind a third party (article 1119, Civil Code); even very advantageous acts do not advantage third persons in whose favor they were done unless those persons have accepted them. Such is the case in stipulations for another, donations (article 933, Civil Code), legacies, or suretyship. Juridical acts have no effect either in favor of or against third parties (article 1165, Civil Code),

[6] See the author's study of "Des Droits Éventuels," p. 30.

[7] This idea had great influence upon political philosophers of the 1800s. *Bertauld*, "Liberté Civile," ch. vii ("Benjamin Constant") and ch. viii ("Daunou").

judgments have only a relative character of finality (article 1351, Civil Code). It is much more important that he who has no interest has no right of action, which means not only that a person cannot bring suit without an interest, but also that, the interested parties being known, others cannot take action, but must all respect their ability to act or not according to their own pleasure. The rule that "no one in France pleads by proxy" is derived from the same principle; at bottom, it is the reason for the inadmissibility of many suits which trade-unions [syndicats] and other groups might wish to bring. Finally, the formerly admitted rule "in rem versum" is to be traced to the principle; it is a happy advantage, which cannot render the person who gets the benefit of it liable to pay indemnity.

This group of solutions, of which we cite only the most striking, is in the code of 1804, or was in the minds of the jurisconsults of the commencement of the 1800s, in whose writings at least we see its reflection. It accords with that respect for human personality which philosophers have so often exalted. More exactly, it marks out the limits of what I would call the juridically free sphere of action of each individual; it permits certain acts to be done without interference, and guarantees against the doing of certain others except with the consent of the party concerned. This theory is, then, the counterpart of that preceding; to "every man may do what he wants" it adds, "but he cannot compel another to submit to the effect of his acts." Its object is to assure equality in liberty, so that we have here not pure liberty, but liberty as the leaven of competition.[8]

[8] This was the peaceful ideal of the bourgeois of 1830. In spite of the July barricades, the liberty desired was not of too high an order, but healthy competition in a small way between neighboring shopkeepers, knowing how to conduct their little affairs agreeably and quietly.

The system is logical and solidly put together. It dominated the legal mind during the 1800s. It is, however, open to criticism. This solid structure, of the style of the Restoration, sharp-angled and stiff, allows no place for an important idea: economy of time and of effort. It is often superfluous to require the consent of a third party to an act which will affect him; if he is to gain by it why should he not benefit at once? This situation started a movement to extend the juridical effect of acts, which has resulted in the theory of the promise in favor of a third party conferring a right upon him immediately, in the absence of revocation[9]; it has resulted in the obscure extension of the quasi-contractual "expenses by an unauthorized agent"; in the unfortunate attempt of the theory of the party representing opposing interests in suits of filiation; in the theory that the transfer of a debt presumes the consent of the creditor,[10] and also in the modern theory of an offer as binding in itself and to a certain extent irrevocable. There is nothing to prevent further progress in this direction. Why is suretyship still a contract, and not a unilateral act of giving security for the solvency of the debtor, just as is now the abandonment of an easement or the release of a debt? Why should not a gift or an unconditional legacy be presumed accepted? In such cases should not unilateral acts extend their empire at the expense of contract?[11] Why should not one person be allowed to bring or defend suits for another when convenient?

There are stages on this road. Law, in presuming the acceptance of a new juridical situation, makes an as-

[9] See *Lambert*, "Stipulation pour Autrui."

[10] See *Gaudemet*, "Cession des Dettes."

[11] This is the reason for the element of error in the well-known question of the respective importance, with regard to the future, of contractual and statutory obligations. The future of unilateral acts, also, should not be left out of consideration.

sumption that is almost always reasonable, as men have in general the same desires. But it may leave one way open for escape; it may permit a manifestation of will to the contrary within a given time. Or a mixed situation may be established like that provided for in article 1121 of the Civil Code for the case of stipulation for another; the third party acquires at once a right which he may accept or refuse, his acceptance simply making irrevocable that right which he has previously acquired.

§ 285. *Liberty as a Bulwark for Static Security.* How may this last idea of liberty, as the germ of competition, be reconciled with the others with which the legislator must also be concerned?

Its strength and its weakness are easy to see in our law, pervaded as it is by the Liberal ideology of the last century. This aspect of liberty agrees admirably with respect for static security; it may even be said that liberty is a bourgeois doctrine because it assures security.[12] Everybody has a little legal realm in which he is master, and nothing could be more agreeable to a calm and limited ideal; as the liberty of one should not encroach on that of the rest, nothing would better suit a narrow mind.

In all cases the owner of a right is sure to keep it because he can be put under obligations only when he has himself willed it. Within the rather far away limits of public policy everyone does what he wants. That is the result of this kind of liberty.

Such liberty, however, is at bottom in opposition to the continual necessity for social rearrangements. If it be admitted that a right once owned is always owned, the right, though useless or even harmful, will always

[12] The connection between liberty and security is so close that *Bentham* says that liberty is only security against injury to the person. "Principles of the Civil Code," ch. ii. [See footnote 7, preceding chapter.—Ed.]

remain in its owner. A right of property is not affected by the circumstance that the property itself is useless to the owner and would be very useful to another. The statute may well say in such a case that the juridical situation might or even should be changed, but to change it would be an infringement of security. On the other hand, such liberty, while it means security for those in possession—"beati possidentes," we are tempted to say—does not encourage activity on the part of third persons who find it an obstacle in their path. It implies, indeed, a régime which takes into consideration the real and not the expressed will. An act done within the legal preserve of another does not at once create an irrevocable right. So the Civil Code decides in cases of promises for another's benefit, legacies, or gifts, which to be perfected presuppose acceptance by third parties — beneficiary, legatee, or donee. Under this régime the law is slow to allow compensation for him who has built upon another's land, for that would be to oblige the owner to ratify changes on his own property, and so to infringe his liberty. Under this régime, also, one hesitates to say that implied agency permits any act to be done in another's interest, for this might run counter to his arrangements. It is because of this régime that the theory of "in rem versum" has been only gradually developed, for it goes against the very principle of liberty, when the enrichment has taken place contrary to the wishes of the enriched.[13]

It would be easy to continue, in the name of dynamic security, to try the case of liberty thus conceived from the point of view of civil law. Let us limit ourselves to the statement that in a general way, its object being to

[13] See *Ripert* and *Tesseire*, "Essai d'une Théorie de l'Enrichissement sans Cause dans le Droit Civil Français," RDC 1904, p. 727; *Ripert*, "Examen Doctrinal," RCL 1907, p. 207.

reserve to every one a free sphere within which he may operate or not as he wills, liberty diminishes social activity, just as the recognition of great estates and great fortunes as objects of rights and not of duties may bring about enormous social losses.

Observe also that while these observations apply especially to civil liberty as conceived by the Civil Code, that is, to egalitarian liberty as the instigator of activity and of limited competition, it would be almost the same with liberty understood as a means for the direct satisfaction of interests, which leads to about the same consequences. The liberty of the bold is favored by the liberal theory, taken at this angle — such institutions as trusts or boycotts will be admitted; but it will not allow, any more than the other, an infringement of another's juridical sphere of action without his consent.

§ 286. *Liberty, with Respect to the Duration of Juridical Situations.* Liberty deserves consideration from yet another aspect, that of duration. It is possible to conceive a restriction on liberty in the name of liberty itself.[14] Thus the law prohibits contracts of service for life (article 1780, Civil Code), leases in perpetuity (Laws of Dec. 18-19, 1790), or agreements respecting future inheritances. Certain things are admittedly illicit, such as a promise to marry or not to marry, or not to change one's last will, or the renunciation of a prescriptive right not yet accrued (article 2220, Civil Code). Such restriction of present in favor of future liberty is a special conception which favors future interests to the detriment of those of the present. It is a process with which we are already familiar, and which consists in providing for social development by the interdiction of an act which, though providing security,

[14] See *Bertauld*, "Liberté Civile," p. 410.

would be too rigid. It is a form of negative liberty. The object is to assure the satisfaction of future interests which we know either not at all or very little. Men of the future and men of to-day considered in the future are assured a sphere of free activity. This aspect of liberty completes the picture of that liberal spirit which was so dear to the bourgeois of the 1800s. It is rather a liberty without breadth. For does man, tormented by a thirst for infinity, recognize anything as great which does not contain a grain of the infinite! It shows a rather hidebound spirit without breadth of view which fears to engage the future. It is wisdom, in truth, but a narrow wisdom.

This form of liberty, or of restriction of liberty, will be received or rejected according to the view taken of the need for protection of future interests. It all depends on whether their mode of satisfaction shall be fixed in advance or whether the field shall be left free, whether the future shall be regulated or reserved. It is a question of the relative importance of security and social change.

All this does not imply that the problem should always be presented as a definite choice between two plain conceptions. Here as always the famous reconciliation of order and movement is not a pure myth. It is sometimes possible. It may be realized, for example, in the cases of the freedom to create endowments with the possibility of modifying them to suit future needs; of the liberty of corporations, with the possibility of a change in their by-laws or charter at a special meeting; of the possibility of a contract for an indefinite term with the liberty to break off on reasonable grounds without payment of damages (article 1780, Civil Code); of the right to create a perpetual corporation with the privilege of dissolution (article 1869, Civil Code); and finally, of

the possibility of creating perpetual juridical situations which may, however, be changed, subject to compensation (articles 530 and 1911, Civil Code).

Modification, rescission, right of repurchase, are three ways of lessening these struggles of liberty against itself, of present against future interest, of security against social change. Like all compromises these are imperfect, they neither result in a complete security or in a complete liberty; but such results astonish us no more.

§ 287. *Liberty and Responsibility.* Let us now take up the questions left untouched by the theory of liberty, whichever of the various conceptions of it we have presented be the one to be adopted. The theory of civil liberty covers the relations of contracting parties between themselves and with third parties, but there is one important point which it does not settle, or more properly for which it gives two solutions, little in harmony with each other; that point is the problem of responsibility.

In criminal and public law, even everywhere in a more general way, a bond is established between the two ideas of liberty and responsibility. This is true not only in speaking of moral liberty as opposed to determinism, but also in regard to liberty as opposed to physical or moral coercion, that is, the coercion of palpable material facts which can be observed. It is evident that responsibility, in such cases, is a consequence of liberty; for whoever takes the subjective point of view in penal law by that very fact considers that punishment must come in where there is will, since it seeks to repress the will and to modify character, the source of volition. The view here adopted is therefore satisfactory. In fact, without discussing whether there can be responsibility without liberty, it must be recognized, in an inverted sense, that whoever admits the

theory of liberty may easily deduce from it the idea of responsibility.

It is otherwise in the law of private rights when it is sought to connect responsibility with liberty, not philosophical or political, but juridical, so to speak. This may be done in two different ways. It may be said that each person's sphere of activity should be fully respected, and therefore any damage done it should be fully repaired, even in the absence of fault. The principle of causality is thus substituted for that of responsibility, strictly speaking. This is an objective conception of responsibility, a rule which gives full security to those in possession, Or, with a certain social ideal in view, that of wills directed towards a profitable activity, it may be said that an individual is responsible only for that which he has willed, with the result of a weakening of responsibility in proportion as the question is one of damage not sought, but simply arising from fault or chance — in proportion as the question is one of the direct or indirect consequences of the act. It then becomes as much a form of justice as of liberty.

It is very hard to make a choice between these points of view; this is so true that even the Civil Code has shuffled. Article 1382 requires fault, but makes the responsibility equal the detriment; articles 1147 and following are in the same spirit (aside from the question of proof); but article 1150 distinguishes, in cases in which there was no fraud, between injury foreseen at the time of the contract and that not foreseen, and enforces liability only for the first. Article 1151 excludes the indirect consequences of fault. On the other hand, articles 1385 and 1386, if not 1384 as recent theories maintain, establish liability without fault.[15]

[15] But evidently the ruling idea of the Code is that expressed in article 1382, which favors the security of the person who acts. This is singular,

This hesitation is not astonishing. The theory of responsibility is essentially one of the apportionment of losses, just as is in fact that of "in rem versum," and on whatever side the burden is laid, whether that of the victim or that of the author of the injury,[16] liberty is indirectly diminished. The legislator in such cases must appeal to an ideal, a principle of public policy, other than liberty itself.

Far from clearing up, the problem grows darker still, if we try to see what is to be protected by the theory of responsibility. I have spoken of a sphere of activity. What does that expression hide if not the probabilities which a person was able to expect in the ordinary course of events, both natural and social?[17] The effect of responsibility is to change probability into cold fact. It is, I might say, a crystalization of the statu quo. The law is only able to apply a rule very sharp, very brutal, to the complex degrees of responsibility with which it deals, and so the limit to which a person can go without engaging his responsibility is extremely hard to establish. Bertauld and Dupont-White, in particular, have already clearly noticed this obstacle.[18] In saying that liberty covers anything which does no injury

as the Civil Code is more particularly a body of law written to favor proprietors than to favor the fever of business. But it is to be supposed that there is a minimum of action which cannot be dispensed with. A truly static condition is rather a conception of the mind than a real fact; every man is compelled to act. Besides, the Code lacks philosophy. If it obeys certain conceptions, it is without quite knowing why, as Monsieur Jourdain made prose.

[16] See in this sense *Ripert* and *Tesseire*, op. cit., RDC 1904, p. 727.

[17] For example, in case of responsibility as between neighbors, I need not anticipate the likelihood of inconveniences exceeding the ordinary ones of neighborhood life. For extraordinary inconveniences I am entitled to an indemnity. See *Capitant*, "Des Obligations de Voisinage," RCL 1900, p. 236, who lays down the principle that a person must so use his own as not to injure his neighbor unreasonably.

[18] See *Bertauld*, "Liberté Civile," p. 65; *Dupont-White*, "L'Industrie et l'État," p. 312.

to another's right, Bertauld opens wide a door for questions. What is the limit to another's right?[19]

To sum up, liberty as generally applied in the theory of obligations is really a means, subordinated consequently to the object sought, which is a social ideal, either of present interest or of competition under equal conditions. It causes serious social losses, and favors static rather than dynamic security.

[19] See also *Emmanuel Lévy*, "Responsabilité et Contrat," RCL 1899, pp. 361ff.

CHAPTER XIX

SOLIDARISM AND THE APPORTIONMENT OF LOSSES

THE THEORETICAL BASES OF SOLIDARISM — DIVISION OF LOSSES IN PRIVATE LAW, ARISING FROM THE NOTION OF SOLIDARITY — ADDITIONAL APPLICATIONS IN PRIVATE LAW — DIVISION OF LOSSES A CONVENIENT COMPROMISE FOR VARIOUS ISSUES — THE DEFECTS OF THE PRINCIPLE — THE MINIMUM-OF-EXISTENCE VERSION OF SOLIDARISM.

§ 288. *The Theoretical Bases of Solidarism.* A very important group of interests which may claim the attention of the legislator is that which touches the apportionment of losses, with which is also connected the idea of the division of gains, and even of compensation for misfortune. Let us remain on the ground of division of losses, where we can study more particularly what method of apportionment termed Solidarism.

The idea of the dissemination of risks is no given principle of the human mind, like security for example, but is the result of a practical elementary fact, that losses are easily borne and become unimportant if they are apportioned among a great number of individuals.[1] Here we have the basis of the famous theory of social

[1] This apportionment of losses among a large number, notably through insurance, is so truly the basis of solidarity that it is expressed in a resolution of the Congress of Social Education in 1900, quoted in *D'Eichthal.* op. cit., p. 175. See further, *Léon Bourgeois,* "Essai d'une Philosophie de la Solidarité," p. 37, who accurately speaks of an organization to *mutualize* the advantages and risks of natural solidarity. See also ibid. p. 49.

solidarity — a much more solid basis that any self-styled quasi-contract that may be invoked.

Léon Bourgeois's appeal to the idea of quasi-contract[2] is in sum no more than an ingenious formula designed for the purpose of goading the instinct of imitation, of logically stretching a preëxisting institution.[3] Its practical value is much more apparent than real. To put it beyond contest, the foundation of this quasi-contract would have to be discovered and then its possible extent fixed. This no one has thought of doing, the notion of quasi-contract being highly obscure even in the law of private rights. This skillfully launched idea is then only a clever and seductive formula devised to attract men's minds. There is no innovation which cannot boast of finding some germ in preëxisting institutions. Why, however, and to what extent this one should be developed is yet to be known.

Bouglé sees in the idea of quasi-contract a means of "developing and perfecting the art of interpreting assents wholly unexpressed, as they most often are."[4]

But though this seems a way of explaining society by something very close to the social contract, is it not in fact simply the ingenious recognition of a necessity, that is, of the opposite of a contract? Is it not simply a justification of society, and not of a special kind of society: Solidarist society? From the point of view of practice, it is said, in urging a quasi-contract,[5] Every person owes much to the rest, so they may very fairly

[2] "Solidarité," p. 133; to the same effect, *Bouglé*, "Solidarisme," pp. 65ff.

[3] In opposition to the exactitude of this formula see *Charmont*, "La Renaissance du Droit Naturel," p. 152 [§ 66 ante of the present work]; *Glasson*, BAS 1903, vol. ii, p. 426. Compare *Groppali*, "La Concezione Solidaristica del Bourgeois e la Teoria del Quasi-Contrato," *Archivio Giuridico*, 1907, vol. i, p. 265.

[4] Op. cit. p. 75.

[5] *Bourgeois*, "Solidarité," p. 119; *Brunot*, op. cit., BAS 1903, pp. 330ff.

take a little from him. But it must be remarked that this system grants a counterclaim not to those who have given but to others, so the force of the reasoning fails. One might as well say that a donee ought to give to others because of what he has received.[6] Where is the solid basis for this affirmation? Bourgeois, in his "Philosophy of Solidarity" (on page 48 and following), declares very ingeniously that the contract is collective,—that, as it is impossible to reckon up each individual's social debt, the practical solution is to extend the principle of mutualization to all risks, which amounts to saying, the explanation comes to nothing exact, so to make it easier let us fall back on mutuality. For those who seek a definite foundation for solidarity, this is somewhat of a deception. Would it not be better simply to say: Whenever a loss is suffered either by a disaster or an accident or even by a foreseen cause like old age, the burden of it should be apportioned among several and thus lightened; or rather (and this is another formula which has special consequences of its own), every human being should be assured a certain minimum of existence. There will thus result two different conceptions of solidarity, a point which its partisans do not seem to suspect.

§ 289. *Division of Losses in Private Law, Arising from the Notion of Solidarity.* Let us devote particular consideration to the former conception, which aims at the division of losses or expenses among several because it is a means of lightening them. We may note at the outset that Solidarism, if it tends to equality, attains it by being at bottom only a certain pooling of losses sustained.[7] And this idea will make it easier for us

[6] See *D'Eichthal*, BAS 1903, vol. i, p. 165.

[7] See *Deuve*, "Le Solidarisme et ses Applications Économiques," thesis, Paris 1906, pp. 142ff., 147ff.

to understand the practical consequences to which Solidarism leads, and which may be glanced over. This theory is the germ of the doctrine which exalts the State [Étatisme], for it is certain that an expense which may benefit a great number of persons will be easily supported if everybody pays a small share by means of a tax which the State would apply to that particular purpose. The advantage resulting from a new road, a new railway, a new State institution, would be almost gratuitous for everybody if he were merely required to pay a few centimes more in taxes.

This idea of solidarity is also at the base of all insurance, either mutual or at fixed premiums; insurance even at fixed premiums simply spreads losses suffered by single individuals over the thousands of insured. It is scarcely necessary to add that it is also the reason for all mutual organizations.

It has even been thought the explanation of tariff unions and of the coöperative movement.[8]

More narrowly understood, this conception is also at the root of many of the compromises scattered through the laws: for instance, the participation of the State and its administrative authorities in public works and in such expenses as old age and sickness pensions; or the system of public aid to many private organizations; or that of assessments on shares of stock, or that of joint-stock companies which scatter the capital of the firm among thousands, distributing it in such a manner as to render them scarcely sensible of the risks of loss, and likewise of the chances of gain.

In private law we find other applications of solidarity as a pooling of losses, and not alone in those vast institutions dear to sociologists which are capable of including the whole world. We observe it in small

[8] Compare *Bouglé*, "Solidarisme," pp. 99, 136ff.

groups which are brought together either by the uncertainty of life, or through contract, in the limited and temporary state of a small rudimentary society within which solidarity reigns.[9] If such a group holds together for a certain time it will acquire greater cohesion, that is, more zeal for the community, and it will facilitate the struggle against the outside world. Company officials, if they have to bear their part of the collective responsibility for a fault, will be the more diligent in avoiding it.[10] In these limited groups, created often by contract, or by the danger of accident, solidarity does away with the disconcerting and unjust element of risk, or rather diminishes it. With the aid of solidarity it is possible to attack that hard rule, "res perit domino," which has such serious consequences in private law.[11] The injury is rendered less burdensome by distributing it.

§ 290. *Additional Applications in Private Law.* We may further consider the applications made of the idea of solidarity in positive law. Among these, we may cite the participation of both interested parties in the consequences of work-accidents, under the Law of April 9, 1898, now extended to trade, and doubtless to be extended to agriculture. In French law, this is not quite accurately termed the theory of occupational risk,[12] since employer and workman each bear a part of the loss, the workman injured receiving only half or two-thirds

[9] *Brunot*, loc. cit. p. 354, does not appear to have thought of this application.

[10] See *De Tourtoulon*, loc. cit. p. 152.

[11] See *Mataja*, "Das Recht des Schadenersatz nach dem Standpunkt der Nationalökonomie," pp. 19, 25, 27. He begins with the idea of solidarity among men, as he says himself, p. 131.

[12] See *Deuve*, op. cit., pp. 126ff. On the modern tendency to extend this sharing of liability, compare the interesting article of *Dereux*, "Du Dommage éprouvé au service d'autrui," p. 69; *Gény*, "Risque et Responsabilité," RDC 1902, p. 818; *Tesseire*, "Le Fondement de la Responsabilité," pp. 163ff.

wages according to the case. We may also cite the sharing, by operator and miner, of the cost of miners' retiring pensions, Law of June 29, 1898, article 2, with an increase furnished by the State, and the more recent system for retiring pensions for workmen in general established by the Law of April 6, 1910, involving the participation of workman, employer, and the State. In other countries the same theory is applied to provision for losses by sickness and unemployment.

Narrowing our circle, we find the same basic idea in article 1150 of the Civil Code, which only requires payment of damages foreseen or which might have been foreseen at the time of the contract when its non-performance is due to mere fault. Anyone may easily be at fault, so the liability is divided in order not to exaggerate the loss.

While article 1150 is perhaps its clearest application, this idea of the division of losses impregnates none the less a great part of the laws, just as it penetrates the practical life of business and the courts. There frequently appears in the law the underlying idea of a limitation of liability as a means to a sharing of liability. Thus a person is in general liable for damages only after notice (article 1146, Civil Code); after the injury, if the contract of sale has not been rescinded, the injured party loses only a tenth of the value of the real estate (article 1681); the claimant need reimburse the person in possession only for the increase in value resulting from useful expenditures on the property; solvent debtors, where the debtors are jointly and severally liable, divide the part of those who are insolvent. Where an heir pays a mortgage debt of the estate, and one of the co-heirs is insolvent, his share of the debt must be paid by all the heirs in proportion to their share of the estate (article 876, Civil Code). Where one heir sues the others on their guaranty, the share of an insol-

vent heir is divided among all who are solvent, including the plaintiff (article 855, Civil Code). The legislator, interested in an equal division, has come to sanction in this manner these two Solidarist solutions.

These compromise measures have an even greater importance in the practice of the courts. Judges rarely allow full satisfaction to one party, and readily admit common fault in accident cases, or some other solution, so that they can put the burden of the loss on several persons.[13]

This disposition corresponds to a tendency in business to diffuse liability. Thus, corporations are created to take over a business and so diminish the chance of loss to each stockholder, associations come into being to lessen the cost of this or that installation or new activity to each member — as for instance the site for games or a shooting ground. Compromises are agreed to not only to avoid suits — economy of effort — but also to lighten the loss which each party tried at first to put wholly on the other.

These various kinds of coöperation to lessen expense and loss tend nowadays to a very wide development, although the highly individualistic French Civil Code has remained a stranger to them. There is accordingly a theory of the just mean between exclusive and opposite liabilities which is to-day attracting more and more attention, it being admitted that the idea of justice (which is, as we have seen, susceptible of various meanings) is insufficient to yield the solution of the problems before us, and it appearing also that there is a steadily increasing desire to provide everyone with a minimum of existence.

The old law and the Civil Code itself, except for a few theories like that of expense for necessary repairs,

[13] See for very exact observations on this point, *Dereux*, op. cit. p. 80.

or buildings on another's land, did not have this point of view; a traditional logical spirit inherited from Roman law made them pay little attention to it, or rather delayed its appearance. It could only develop after a more realistic theory had penetrated all orders of human knowledge.

Division of losses, like the solidarity of which it is a part, has a certain, though more limited value. It is, of course, not borrowed directly from the confused variety of forms which nature presents,[14] but it responds to reality [15] and to certain aspirations of the human soul. It mingles the real and the ideal.[16] It gives the a priori its share, but limits it happily.

§ 291. *Division of Losses a Convenient Compromise for Various Issues.* How may the division of losses be reconciled with the other interests which preoccupy the legislator?

A sort of legerdemain suggested by practical experience, and drawn from the pyschological consideration that to the mind's eye big things look bigger and little things smaller than they really are, solidarity, that skillful system of plucking a good many fowls without making them cry out, is evidently destined to a great success.

It is doubtless not wholly in accord with the great theoretical tendencies of legal life, justice, and static and dynamic security; but as a compromise it has the advantage of not colliding too directly with them. And in that universal approximation which is the science of life, in view of the consideration that facts have the bad taste not to respond exactly to theory, this advantage may be a reason for developing the doctrine of solidarity.

[14] *Bouglé*, op. cit., p. 39. Compare *Brunot*, BAS 1903, vol. ii, p. 315.

[15] It is useless to rehearse here the element of reality in social solidarity. This point is admitted even by the anti-Solidarists. See *D'Eichthal*, BAS 1903, p. 170; in the same *Juglar*, BAS 1903, vol. ii, p. 417.

[16] *Bouglé*, op. cit. p. 53.

At the same time, just because this theory is often a compromise between others, it assures a certain measure of support to each of them. Workmen's compensation gives a new security to the workman, and it is the same with all kinds of insurance for all who run risks. Thus the limited liability of the stockholder is an inducement to invest capital, and so favors the idea of dynamic security to a certain extent.

It must even be admitted that sometimes it is a cause of economy of effort; applied to accidents, to work-accidents for example, it avoids all delicate weighing of responsibility. Would it not be much simpler if it were introduced into the theory of the liability of the lessee in case of fires, by dividing the loss to be supported? This would not, however, always be accurate, and the advantage should not be exaggerated. The division of loss would sometimes be more complicated than the application of the brutal "res perit domino," as, for example, if a loss were divided in proportion to the gravity of each person's fault, as would happen where all were at fault.

§ 292. *The Defects of the Principle.* As the value of this finely drawn theory is especially based on the pyschological consideration which we have indicated, it has certain limits. It is in reality only a skillful trick, especially seductive to politicians whose great secret is to know how to get things done. When these participations in losses become too numerous, they will weigh heavily. The burden of contemporary State theories is to-day being thought annoying, because the losses put upon the community [17] are becoming so very numer-

[17] This is particularly frequent in modern régimes, where the necessity of the Government's having with it a majority naturally by no means stable, leads it to satisfy the public by means of expenditures from the treasury, certain persons saying to themselves that the loss sustained by the general body of citizens would be insignificant.

ous that everybody's share is large. So it is with the many forms of insurance of liability which the new legislation has imposed or is about to impose; they will bring with them a heavy burden of premiums.

Pushed to an extreme, this theory, then, comes into opposition with the very ideas with which, at first, it did not collide. People find themselves so burdened with liability for various forms of loss that business enterprise is checked. The capitalist will feel himself menaced by the extensive though partial liability which is put upon him; the business man will see his general expense go up.[18]

Will the final result be an increase or a slowing down of activity? It will be rather a slowing down. "L'État-isme"[19] has many advantages, but the economists have sufficiently showed its disadvantages — the fairly regular but drowsy and rigid operation which results in all institutions.

Division of liability also produces a degree of indifference to injury, which increases with the increase in the number of persons participating in the loss. How many insured realize that, in not taking proper precaution against fire, they are contributing to an increase in premiums? How many individuals feel that in injuring the State by making it pay damages in improper cases, they are really injuring themselves as citizens?

Must we not even go farther and call attention to the point that divided liabilities, especially if diluted by insurance, actually favor disaster? Have not the insured themselves been known to set fires in order to receive a sum of money of greater value to them than the building? The Law of April 9, 1898 on workmen's compen-

[18] See the observations of *Frédéric Passy* and *Levasseur*, BAS 1903, vol. ii, pp. 364 and 370.

[19] [I.e., the doctrine which would exalt the State; Interventionism. — TRANSL.]

sation foresaw intentional self-injuries. Much heralded cases have revealed fraud in connection with accidents, and have also attracted attention to the great increase in small accidents,[20] against which the courts have felt it necessary to take action.[21]

In the third place, it must be noted that every division of liability, of future losses, frequently requires, directly or indirectly, the regulation of complicated interests. Every community of interests implies difficult rules, and then a part of the nation's activity will be spent in working out this division of losses or of expenses, and so a social ideal of activity, of great production to assure greater enjoyment to all, will not be realized. How much activity is absorbed by that method of accomplishing a community of loss which is called insurance; how much more by regulation of general average!

Finally, division of liability brings about in many cases the immobility of social classes. It renders it a matter of indifference who can become an employer, because of the heavy burdens laid on members of that class. It immobilizes acquired situations: the workman is more certain to remain a workman. That right to gain anything which satisfied the old Liberal bourgeois becomes a vain word. A ditch is being dug between classes, and in consequence each side is preparing for the struggle which is thus rendered inevitable, since social rearrangement through the renewal or the development of the ruling classes seems to be as essential as the renewal of plants under cultivation. Without it will come a lowering of intelligence and of activity among the sons of sated capitalists.

§ 293. *The Minimum-of-Existence Version of Solidarism.* We have observed that solidarity may be con-

[20] *Pierre Hans*, article on work-accidents in *Réforme Sociale*, April 1910.

[21] See RDC 1910, p. 178; Sirey 1910.2.117.

ceived, perhaps usually is conceived, in another way. Instead of basing it on the misleadingly precise appearing theory of quasi-contract, which will cause many deceptions, it may simply be said that every man should nearly always be entitled to a minimum of existence.[22] Except the delinquents and the lazy, every individual should be sure of getting certain advantages from society, and to assure this mutualization is possible up to, but not beyond, a certain point. Thus there will be substituted for the theoretical right of every man to attain the highest dignities, the highest fortunes, the practical right which can always be realized not to die of hunger. Such a thing may be reconciled with the duty of activity, and consequently with that need of goading it, which marks the western world.[23] It may at least be hoped that the future will not thus be sacrificed to the present nor economic development to the sweets of security. There is a reconciliation which must be sought, but we must not imagine that we have discovered a new world[24] by establishing certain new equalities, without destroying inequality so far as it has a value of its own.

To this conception not solely such measures would attach themselves as the partial liability of the employer in case of work-accidents, or even the right to a retiring pension assured by payments of both employer and workman, but also such very precise measures as the freedom from creditor's process of alimentary pensions (article 581, Code of Procedure), of workmen's compensation allowances (Law of April 9, 1898, article 3), and of wages up to seven-tenths (Law of Jan. 12, 1895); the non-

[22] See in this sense *Tarde*, BAS 1903, vol. ii, p. 421; *Groppali*, op. cit., *Archivio Giuridico*, p. 271, thus understands the Solidarism of *Bourgeois*.

[23] We believe that the authority of *Tarde* may be invoked to support this proposition.

[24] See, however, *Andler*, "Le Quasi-Contrat Social et M. Bourgeois," RMM 1897, p. 520.

assignability of wages and of allowances due on account of work-accidents; the privilege of half-pay accorded by the Law of 1898 to workmen in case of temporary disability, the privilege of servants (article 2101, Civil Code), and the right of all workmen and employees to a priority in cases of the employer's bankruptcy (article 559, Commercial Code). In a general way, this application of the idea of a minimum of existence will embrace all measures which assure to the workman the payment of a sum essential for his livelihood, and those which make of him a sort of half minor, not completely free in the disposition of what he owns, or even of his labor (as occurs as the result of laws regulating hours of labor, or providing for one day's rest in seven).

The conception of an assured minimum of existence is, in a word, only a particular aspect of what Charmont calls the socialization of law[25]— that conception of law which makes it more comprehensive, in the sense that it takes into consideration not alone man whose rights must be respected, but men, in different social situations, the rich and the poor, especially the poor. So conceived, law is no longer that large structure resembling the classic theatre in which appeared only general abstractions, the miser, the liar; it becomes more like Balzac's Human Comedy, which shows men in infinitely varied situations. Socialized law recognizes this difference in order to give to each what is suitable to him according to his fortune or profession. In this form, which, responding to a powerful necessity, transforms the abstractions of the Declaration of the Rights of Man into concrete things—the rights of men, social solidarity is fully acceptable.

[25] See "Le Droit et l'Idée Démocratique," the chapter on the socialization of law.

CHAPTER XX

THE NOTION OF GENERAL INTEREST

EXTENT OF THE GENERAL INTEREST — RARITY OF IDEAS COMMON TO ALL — INTERESTS OF GROUPS; THEIR SOLIDARITY AND THEIR OPPOSITION — THE GENERAL INTEREST A ZONE OF UNCERTAINTY — THE DIFFICULTY OF MEASURING THE GENERALITY OF AN INTEREST — THE ILLUSORINESS OF THE NOTION OF GENERAL INTEREST.

§ 294. *Extent of the General Interest.* There are few ideas about which lawyers, sociologists, and economists have talked so much, as about general, as opposed to particular interest, quite apart from the nature of these interests — of security, of liberty, of convenience, or any other. Here interests whether termed general or particular are dealt with in a different aspect from that considered up to this point; they are thought of from the point of view of extent, and not from that of their object or nature. Adopting this new point of view, let us analyze the sacrosanct principle that the general interest should always prevail over that of individuals.

Is there such a thing as an interest which is "general" by nature, and thus different from particular interests? The only answer which has been made to this question — and it is an answer which is merely approximative, as we shall see — is that idea, so often proclaimed, that the general interest is but the sum of individual interests. If this idea be carefully analyzed it will be found much

more complex than would be expected; the convenient explanation so often misused will quickly fade away.

The general interest is not merely that of living, but that of future generations as well. Those owners of elegant edifices dating from the 1400s and 1500s, who, a century or two after their construction, destroyed them to make place for pompous neo-classic monuments, committed acts contrary to the general interest, for they deprived our eyes of the delight of buildings charming by reason of their ingenuity and variety. But who in their times thought of reproaching them for the destruction of these "barbaric monuments?" To act contrary to the general interest, therefore, is sometimes to act contrary to the interest of future generations. The general interest is not merely that of living men, but also that of those who are to live. A similar short-sightedness explains the weakness of certain ancient democracies. It can be understood that the people became at last disgusted with the imbeciles, the insanely proud, the egoists who had often served as their monarchs or aristocracy; but it does not follow that the people's short sight, its ignorance, which made its own government live from day to day without largeness of thought, were necessarily the last word of wisdom, and faithfully represented the sum of present and future interests. How hard it is to foresee the thoughts of the future, its ideal, its interest! We perceive the mistakes of the past. Will the future not uncover ours?

Even if we disregard the true view of the general interest as including that of future generations, as recognizing our solidarity with the future, and narrow our study for convenience to the present and nearby periods, we find the idea highly complex.

§ 295. *Rarity of Ideas Common to All.* General interests, in the sense of being common to all, are ex-

tremely rare, whether we consider them subjectively as ideal sentiments, or as objective interests. This is particularly true of our existing societies. If in small primitive communities the uniformity of social relations and of culture may be sufficiently complete to open the way to the formation of a common conscience, the more the collective being becomes larger and more complicated, just so much more do its interests divide, and do political and religious parties also come into being, and form obstacles to that agreement which is the foundation of a uniform public opinion.[1]

There are some ideas, or rather opinions, which are common to a very great number of persons. Almost every one has an opinion in regard to the death penalty, there are many who hold an opinion with respect to the chief political parties and rejoice in their success or downfall. Is it necessary to add that on almost all such matters opinion is divided, so that the general interest becomes that of a majority — the interest, or what is believed to be the interest, of one group opposed to another less numerous?

This observation discloses the character of modern politics. Compelled by its very nature to court public opinion, it is impelled, in modern States, to take up the only questions which the general public is able to understand, and which are often the least worth while, being frequently personal questions which are the easiest to comprehend.[2] Positive material or economic interests are thus sacrificed to ideas, to academic discussions, to so-called questions of principle, unless the Government, as guardian of the interests of living and of future generations, is energetic enough to force the representa-

[1] See *Tanon*, "L'Évolution du Droit et la Conscience Sociale," p. 34.

[2] So it comes about that in some foreign countries, political parties are wholly personal.

tives of the public to face high thoughts and vast enterprises.

§ 296. *Interests of Groups; Their Solidarity and Their Opposition.* Let us now take up interests properly so-called, putting aside the ideals, often low, only occasionally elevated, which are common to important groups. Interests, much more than ideas, are peculiar to certain groups. The interest of producers is not that of consumers, and that of employers is not that of workmen. Nevertheless, the development of a mercantile business (sellers and buyers), or of a factory (workmen and employers), is connected by a bond of solidarity to that of neighboring enterprises; and this bond extends from neighbor to neighbor even to those farthest distant, with constantly diminishing force like the progress of a sound wave. In any event an interest may be stretched so far that the defeated contesting interest will inflict a certain loss upon it in consequence of its defeat; for example, a workman desirous of getting an increase in wages which will lessen his employer's profits cannot carry his demands so far as to see the shop closed and himself thrown out of work.

The interests of different groups are thus at once solidary and opposite,[3] but the solidarity is ordinarily not felt until the struggle of interests has reached a point at which it threatens or has accomplished the complete ruin of one of them. Community of interest subsists nevertheless. The ruin of an employer harms his employees, although his misfortune may be in part caused by the low wages he paid (as it may also result from his bad handling of his purchasing or selling department).

§ 297. *The General Interest a Zone of Uncertainty.* The solution answering to the general interest therefore

[3] See on this combination of struggle and coöperation, *Tanon*, "L'Évolution de Droit," pp. 103ff.

often appears not so much a rigorous and precise solution as a certain zone within which a contest may well continue between hostile parties over certain propositions. Nevertheless it is important to mark off this zone and to keep within it, for by going too far or by falling short of its limits there will be a sacrifice of at least one of the opposing interests, which should coëxist according to the general conception of the rôle of humanity, which must never be forgotten.

Thus, whether an owner is to be liable for the actual state of things belonging to him, or is to be liable only in case of fault, may be decided either way without harm to the general interest, unless one or the other solution bear so hard on one group as to destroy wholly its activity.

Izoulet exaggerates when he says, trying to identify the general interest with that of individuals, that if individuals become less the State cannot become greater. "Everything which increases the value of the individuals who make up a society," says he, "increases the value of that society, and the converse is also true."[4] This is only approximately correct. The modern State is so complicated a machine that there are losses in the transmissions and the same interests are solidary and adverse at the same time.

Without doubt one may regard "one for all and all for one" an ideal formula; it may be that individual perfection is possible only through social justice.[5] But these are only ideas of action, pedagogical formulas which may incite to imitation; they are not precise rules. Useful for the public, they are too gross for the laboratory, so that while we do not neglect them, we do not assign to them an absolute value.

[4] "La Cité Moderne," p. 416. To the contrary, *Penjon*, "L'Énigme Sociale" (Travaux de l'Université de Lille), pp. 95ff., who shows that balanced egoisms and altruism are different things.

[5] *Izoulet*, op. cit. pp. 436, 448.

§ 298. *The Difficulty of Measuring the Generality of an Interest.* Interests termed general often have a special character, in that they are interests of a group. But no one member of the group is individually much affected. For him, it is often more a convenience than an interest. Public improvements, for instance, for which is made a wide use of the right of condemnation, are put through in the interest of persons whose individual gain is small. A new tunnel, a new railway, will shorten my journey to such or such a point, often an advantage very unimportant to me. It is only the sum of these slight interests which can prevail over a property right. Is it not, then, to be feared that abuses will creep in, that the most sacred rights will be set aside to save a little annoyance to a few individuals?

If, consequently, some interests exist which are to be preferred to others because they are general, or more correctly, collective, it is not always easy to determine which are preferable to others because they have a true character of generality. Each one of these interests, by reason of the solidarity which unites mankind and the legitimate hopes that the interest arouses, is collective up to a certain point. But this character of generality may be measured at once in extent (by calculating approximately the number of persons interested in a reform), and with regard to its importance for each one of the members of the collectivity, both present and future. In every interest there are two equally important things: its extent and its depth. The latter is not always the same with everyone affected; for the ruin of the head of a family, which seriously injures his children and may affect very greatly his employees, will only slightly harm his butcher and baker. The extent of the interest may also include the future or be limited to the present solely. It is only after these difficult

calculations and measurements have been made that it may fairly be said that such and such an interest is preferable to such and such another one.

From these circumstances it results that such expressions as general interest, private interest, social interest, and interest of the individual (or even social-individualistic expressions which imply some kind of transposition of these) are vague and of little value. A private interest "in abstracto" is a collective interest; a private interest "in concreto" interests a social group by repercussion.

Likewise where the question is whether an heir is to be held for debts exceeding assets, his interest may be said to be personal, that of the creditors general. But that of the heirs is general too, for if this class is too heavily burdened with debt heirs will not accept inheritances. On the other hand creditors will be less inclined to lend if their right of action against heirs is cut down, and the general interest of credit will suffer. Evidently, in such a case as this, it is very hard to classify the interests as general and particular and to measure the breadth and depth of each one.

§ 299. *The Illusoriness of the Notion of General Interest.* On the whole, general interest is only a convenient expression for an important collective interest, but as in this sense almost all interests are general, they can only be classified according to their extent and relative force, and that clumsily enough. We should then be suspicious of so convenient an expression, we should see exactly what present and future interests it covers; and it is only by this painstaking and slow method, difficult to apply, and running the risk of error (for who can measure the future and uncertain?), that we can escape being the dupes of a word and can bring to light, behind it, those things that are at the base

of all juridical problems — the primordial interests of security, adaptation, and expenditure of the least effort.

All of these solutions, morever, are only special applications of the solution which has long been offered for the problem of the universal. The head of the nominalists in the 1300s, William Occam, wrote: "The universal is a sound of the voice, a written word, or any other sign, whether conventional or of arbitrary use, which stands at once for several singulars. The sign is itself singular, it is universal only representatively, so that to be universal means solely to represent or to signify several things at once."[6] These are elementary truths which the nature of our minds, poorly adapted to the world of facts, sometimes causes us to forget.

[6] Cited by *Hauriou*, "Philosophie Scolastique," vol. ii, p. 423. As to the signal importance of this theory in regard to the notion of moral persons, *Clunet*, "Les Associations," vol. i, pp. 338ff.

CHAPTER XXI

FUTURE INTEREST

IMPORTANCE OF FUTURE INTERESTS — TWO FORMS OF PROTECTION — RECONCILING FUTURE INTERESTS AND CHANGE — THE LAW CAN ONLY ASPIRE TO A COMPROMISE SYSTEM.

§ 300. *Importance of Future Interests.* Anxiety for future interests may appear in the law under two forms, according as it may take a longer or shorter time for the interest to take effect. The men of a certain period may feel that it will be to their interest, at a given moment, to have this or that advantage. An individual may foresee that he will perhaps need to acquire neighboring immovables for an enlargement of his factory, or that he will need, after so many years, considerable sums of money to provide for his children. From another point of view, men may concern themselves with the interests of coming generations, by protecting their life by measures against substitution at birth or abortions, and by care for their material and moral needs. This care may show itself in the creation of establishments for the poor, the sick, and the aged, and in the opening of schools, or in measures more concerned with private law, such as endowments, donations, legacies to unborn children, marriage portions, entails, provision for long or permanent inalienability of property, and so on.

In neither case is the anxiety for future interests as clear in actual life as it seems to the lucubrations which

isolate its various elements from one another. In practice, present are nearly always protected at the same time as future interests. Public works, private constructions even, are built to serve the coming generations as well as the people of to-day, and frequently the interest of our descendants in juridical operations, as well as in simple facts, is cloaked by the interest which we ourselves possess in them from this time onward.

§ 301. *Two Forms of Protection.* If we succeed in isolating in our imagination the protection of future interests, they will be observed to be of two forms. A person may simply have reserved for a future day, under a statute or by contract, the right to modify such or such a rule; as, for example, in the case of an act performed under a potestative[1] condition or subject to the happening of a certain event; or when the parties have reserved, or the law guarantees them, the right to modify or to cancel a contract unilaterally with or without damages (articles 1780, 1794, 2004, Civil Code); or when the stockholders or partners have the right to demand the anticipated dissolution of the corporation or partnership. The interest protected in this case is that need for a social rearrangement of which we have spoken. There is nothing to add as to its importance or the difficulties which it raises.

The other form is when a future interest is sought to be protected by providing it from hence forth with a definite means of defense, with a rigid armature, of such a sort that there will come about a predetermining state of law, which can be invoked by the chief interested parties, and not a simple permission, a simple possibility of action along given lines. The form of protection for

[1] [Some of the standard English law dictionaries will be found to contain definitions of these technical terms of the French law of contract. —TRANSL.]

a future interest is thus determined in advance. This is the case when possessions are declared inalienable, or subjected to the dotal régime or to entail, or assigned under "casuel" or "mixte"[2] conditions, or dedicated to an endowment. It is also the case where juristic [moral] persons make important reservations, use of which will be made in future, or by means of which their revenues will be devoted in perpetuity to a certain purpose, such as the reward of certain attainments or the assistance of the sick.

The creation of these dormant estates, partly or wholly held in mortmain, results from the quest for static security, a quest of a high order it is true, for preoccupation with the future is one of the best sides of civilization. It seeks to prolong a certain state of fact, to assure resources to persons who are to live in future. This static security offers the same advantages and raises the same objections here as everywhere else. It is inspired by a foresight which may appear prudent, but which after the arrival of unlooked-for events may become in reality inept.

§ 302. *Reconciling Future Interest and Change.* On the whole, then, the protection of future interests, the insurance of the future, presents the same difficulties as assurance of the proper working of order and change in the domain of present interests. In proportion, however, as the time in which the future interest will take effect is extended, the concern for change, and adaptability to social development, increase in importance, just as the danger that a beam will bend increases in proportion to its length.

There are several ways of assuring this adaptation. The best known is often the masterly stroke of the State or of any other power in altering the original

[2] [See note 1 ante.]

destination of an estate. This kind of coup d'État provides for adaptation, but destroys security. It has nevertheless often become indispensable, for man is so short-sighted as naïvely to imagine that eternity, the necessity of his life, is projected into his world of fact, and that the present situation will never change. There result at certain moments, in long continuing operations, sharp discords between that which is established and the needs which must be satisfied.

Nevertheless by occasional glimpses of clear sky men become aware of this necessity of adapting themselves to the incessant renewal of things. Not to speak of that need of modifying endowments which law writers are nowadays debating,[3] we find two forms of manifestation of the care bestowed on the management of future interests.

The law in certain cases authorizes perpetual contracts, and permits not their modification but their cancellation. According to article 1911 of the Civil Code, a perpetual annuity may always be converted into a lump sum by the payer of the annuity, and so also by article 530 may annuities created to pay for real estate. In the same spirit, article 1869 permits the dissolution of even a perpetual partnership by the will of one of the partners, and article 1780, as construed by the courts, permits the abandonment of an indeterminate contract of services for a good cause. The courts have ruled that any partner in a perpetual partnership may retire by giving up his share.[4]

The second form is the prohibition of contracts for more than a certain length of time. Thus the famous Laws of December 18-29, 1790, prohibited leases for more

[3] See *Bulletin de la Société d'Etudes Législatives*, 1909, p. 199 (report of *Saleilles*), pp. 302ff. (report of *Larnaude*), p. 445 (definitive draft, article 15); *Jean Escarra*, "Les Fondations en Angleterre," pp. 205ff.

[4] Court of Chambéry, Feb. 20, 1905, RDC 1905, p. 353.

than ninety-nine years, and the right of redemption cannot run over five years (article 1660, Civil Code). Under article 1048 the entails permitted cannot extend to heirs more than one degree distant.

§ 303. *The Law Can Aspire Only to a Compromise System.* In view of this justifiable suspicion of juridical acts of long range, which shows itself in prohibitions, limitations, and reservations of the powers of adaptation to new situations, or even in the violations to which these acts are necessarily subject, it is proper to ask whether it would not be wise to forbid every juridical operation of long duration. But even this solution is not acceptable. Tormented by his thirst for the infinite, man is influenced to action only by the prospect of infinite realizations. He wishes to establish perfect justice, to succor the poor for ages to come. To forbid his giving long duration to his acts, to limit him to the present or to the immediate future, would be to destroy an important spring of action, to disallow a system of static security in the case in which it has the greatest value — as a spur to action. Probably the problem of the protection of future interests will never be settled, any more than that of charitable work, which it is well to do but most difficult to do well. To urge humanity to action, it will always be wise to offer it the perspective of long continuing enterprises, of great things, but in execution they will not give the desired result, or will have to be profoundly changed. Here again, the law can do no more than offer compromise systems.

However it may be decided to treat future interests, their place with respect to present interests must be established. The interest of the future is not always apparent to the general public.[5] Nevertheless it is very important to look beyond this fact if we are not to fall

[5] See *Izoulet*, op. cit., p. 419.

into utter narrowness of views. The simple recognition of future interest, however, does not leave the matter entirely clear. Given constant change, both in minds and in things, I have shown how difficult it is to foresee whether full satisfaction will be afforded to future interests. How can we compare this unknown quantity with immediate interest? This would only be through the value we would lend to future, uncertain interest, only through the hope of being still alive at that future moment, or through a special interest that we may have in the future. Subjective appreciation here fills a large place; it can lean steadily toward future interest only as the result of a real hypnotization of thought, through faith, in the true sense of the word. In very many cases, though not in all, it is impossible to calculate the relative value of the two interests in presence; by pretending the contrary, by affirming in many cases the necessity of making sacrifices to the future interest, we are not proceeding scientifically, but are preaching, as men must preach to induce action.

Graver yet is the question whether it is permissible to do juridical acts in which the interest of future generations is solely considered, and no advantage is offered the present. The courts have had to wrestle with it in connection with entails providing for the capitalization of income for the benefit of the remainderman.[6] It may also appear in cases of endowments, the capital of which is at first insufficient and has to be invested a number of years in order that it may suffice for the expenditures designated. In spite of the difficulties presented by this question, it seems advisable, in this eternal struggle

[6] Court of Caen, Nov. 20, 1906, Dalloz 1907.2.265 (with the note by *Planiol*), Sirey 1907.2.313 with note; same case on appeal, Cassation March 6, 1908, Dalloz 1909.1.285 with the conclusions of *Feuilloley*. These decisions have treated capitalization as lawful. Contra, Court of Algiers, Jan. 20, 1879, Dalloz 1879.2.143.

between security and development, to take refuge in a compromise and to allow these accumulations to the extent to which inalienability is permitted — a point on which the courts have taken a well-known middle ground between the prohibition and the full authorization of inalienability and exemption from execution.[7]

Provision for future interests appears then, like these commendable things, to respond to one of the highest human instincts, foresight, but to an instinct which must be treated with circumspection, so easily do the facts and our mental attitude undergo change.

The future has always been a Pandora's box for humanity, from which it must not be taken away. We cannot neglect man's yearning to prolong his life into the future, to extend his lean earthly existence. But how shall we prepare for the future? By building so solidly the master workmen of the Middle Ages have gratified posterity with their uncomfortable castles; by building without careful thought, epochs eager for elegance, for too great refinement, have deprived us of the sight of many marvels.

[7] It is well known that the courts admit these clauses when they are limited to some years but annul them when they are perpetual.

CHAPTER XXII

MORAL INTEREST

THE OBSCURE BOUNDARY BETWEEN MATERIAL AND MORAL INTEREST — INTERESTS WHICH HAVE INTANGIBLE VALUE — THE DIFFICULTIES WHICH THE LEGAL PROTECTION OF INTANGIBLE INTERESTS RAISES — HOW THE EXTENSION OF REPARATION AFFECTS OTHER FUNDAMENTAL PRINCIPLES — HOW OPPOSITE OBSTACLES MAY BE AVOIDED BY A MIDDLE COURSE.

§ 304. *The Obscure Boundary Between Material and Moral Interest.* Law has always found means to provide for pecuniary interest, but it has experienced much difficulty in deciding on the place to be given to moral[1] interest.[2] It is to these interests that we have devoted this chapter, for it is evidently desirable that they be recognized, and protected both preventively and by a system of reparation. The law, which guards all important interests, cannot refuse to defend the moral

[1] [In this chapter it seems best not to translate the author's adjective "moral" by a less elastic English expression, e.g. "spiritual," although this involves using the word in a somewhat loose though recognized sense; compare the current expressions "moral effect," "moral support," etc. —TRANSL.]

[2] The question of moral interest has given rise to important studies, to which I refer: *Jhering*, "De l'Intérêt dans les Contrats," in "Œuvres Choisies," vol. ii, pp. 145ff.; *Chausse*, "De l'Intérêt d'Affection," RCL 1895, p. 436; *Baudry-Lacantinerie* and *Barde*, "Obligations," iv, p. 2871. Compare article 151, Swiss Civil Code, which allows damages for mental injury alone in divorce cases, and article 54, which recognizes a right to reasonable damages in cases of moral tort. [This reference to article 54 is obscure, and an apparent error in the French edition.—ED.]

We do not desire to treat this question fully, either from the historical or from the theoretical point of view. We simply want to show how the principle of allowing damages for moral injury conflicts with other admitted principles.

ones, which are just as important as the rest — a point which Jhering has so thoroughly treated that it would be folly to consider it here.[3]

In the first place, what should be understood by "moral interest"? This is very uncertain. Almost every interest is actually moral from certain points of view; and almost everyone, if one goes to the root of the matter, descends to the level of material interest, at least when it is viewed in certain aspects. In fact the most material possession — a field, a book — is a source of pleasure to me because of the use to which it may be put, of the memories which it enshrines. The wholly ideal pleasure derived from a miniature, or from a beautiful monument, represents an interest for me which has its pecuniary aspects, and so may the pleasure that I may find in giving orders to workmen, to get some benefit from their labor, or in obeying orders and thus escaping all responsibility.

It would be desirable to take into account every moral pleasure, every unhappiness which may be given by a thing, so as to make each such sentiment the source of a right; but this theory, though very well adapted to reality, would not conform to the need for security, to the always rather objective character which the law must assume. Nothing could vary more than the sorrow felt by different persons at the same happening, even though they were in an identical situation. Character, age, and condition of health here have a considerable influence. Then again, what difficulty there would be in the proof! How could we calculate, even approximately, the pleasure which a certain possession would procure for a particular individual, or the sorrow which its loss would cause him! Nothing would be less reconcilable with the principle of economy of time

[3] "Œuvres Choisies," Meulenaere's French transl., vol. ii, pp. 154ff.

and of activity, with the idea of security, which presupposes that there is a fairly fixed basis for the estimation of every right.

The law must, therefore, make objective estimates of the pleasures and sorrows which each person may feel. In practice, averages are established, and approximate estimates are made of the sentiments which an individual should experience, taking into account social condition, and the various data for classification found in the circumstances of every individual— reputation, profession, and age. This procedure simplifies the facts, and even forces them to some extent; but it leads out of the psychological realm of sentiment into the social, economic, or juridical sphere of interests.

Placed on this at least apparently more solid basis, the law finds itself face to face with material and moral interests, to make use of current expressions. The former are at bottom so only in name. The name "material" is deserved only because a material possession is damaged; it is by the interposition of this material object that one is morally attacked.[4] Moral interests presuppose a right susceptible of injury without any injury to a corporeal possession, as in the case, for example, of honor, the right to a name, respect for the dead, or legitimate affections.

Material interests, those connected with the presence of material objects, if injured may be at least approximately repaired. Though no one object is absolutely identical with another, a great many are similar and comparable; money is often a convenient term of comparison between possessions, though it really plays this rôle but imperfectly. Without entering into the economic theory of value, whose difficulties arise pre-

[4] This is analogous to what all jurists have observed in regard to so-called corporeal rights. In fact all rights are corporeal.

cisely from that fact, note that objects have an exact value only by reason of their meeting common wants, which makes it possible to establish a sort of market price for them. Rare and unique pieces have only an approximate or indeterminate price. What is the value of the unique work of a celebrated artist, or of a monument of peculiar interest?

§ 305. *Interests Which Have Intangible Value.* Besides this sort of market value of things, we must take into consideration that they may have moral value. A family estate has a special value. An old diploma, old letters, beyond their worth to collectors, may be peculiarly valuable to the descendants of those whom they concern. An old portrait is not quite the same as a family portrait. An interest bound up with a material object may have, therefore, beside its pecuniary, a moral value, which should always be estimated from the point of view of ordinary sentiments, those which a descendant usually has for his ancestors for example.

Other interests have no direct relation to any material object, as in the case of honor, the right to a particular name, family or civic rights. In these cases it is impossible to distinguish a commercial value; there is nothing but a purely moral value, free from any direct material commixture.

Besides these interests, if we keep always within the field of objective, average estimates, there are others which, unlike the preceding, are not susceptible of private appreciation. Honor belongs to one person and not to another, and a right of guardianship belongs to the guardian and to no one else.

But in the social environment, naturally vibrant, whose parts are for that reason described as solidary, we shall find by reason of this circumstance a new source of moral interests. Every act of a single individual

reverberates from individual to individual with a greater or less remoteness of effect: a crime disturbs a whole population; the owner of an old artistic structure, by destroying it, arouses a world of amateurs to such an extent that to prevent such deeds numerous societies are formed. Accordingly, there are acts which attack accessory interests in attacking each individual: it may be a small thing that one person in a city is not able to see any longer the bulky outline of some building with sculptured façade, but when a similar pinprick is felt by thousands it becomes a serious matter. Most great public interests are kinds of madrepores which assume a colossal importance when heaped up by thousands. There are also injuries to rights of a material order, which work no material injury, but of which the courts take cognizance,[5] and lastly there are the legitimate affections.[6]

§ 306. *The Difficulties Which the Legal Protection of Intangible Interests Raises.* Always rather unbending, what can the law do in face of facts so diversified and shading so delicately one into another? Its utmost effort will result in not very happy compromises.

It is faced by two kinds of difficulties, the bond between which is not ordinarily perceived: the question of the reparation of moral injury, and that of the admissibility of suits brought either by persons not interested from a material side, or by associations.

If the law assumes to redress moral injury, the circle of persons entitled to sue will naturally be enlarged, and in many cases the same act, instead of injuring a

[5] See Court of Poitiers, note, Dec. 24, 1909, *Gazette du Palais* 1909 2.677 and note.

[6] See the distinction between moral interests and interest of affection drawn by *Laborde*, RCL 1894, p. 26. On the protection of this interest see *Mataja*, "Das Recht des Schadenersatz nach dem Standpunkt der Nationalökonomie," p. 135.

single person, will ground an infinite number of rights of action. The act with juridical effects will be found to have consequences widely diffused.

The problem is equally difficult however it is approached. May a moral injury be redressed? We have already seen that a material injury is redressed only very roughly; as it becomes the question of an injury more moral than material the difficulties increase. As has been justly remarked,[7] what is proposed is nothing more than some countervailing benefit to offset the injury, and the idea of repairing injury is thus abandoned. The whole thing is evidently a matter of more or less. Almost every injury is irreparable and ineffaceable if it be closely looked into, and accordingly it does not seem that one should balk at that obstacle, in times accustomed to rather fine notions, to nuances. When it is recognized that a material injury can be repaired only imperfectly in spite of appearances, why refuse to repair moral injury on the pretext that it is subject to the same imperfection? That is why, indeed, the reparation of moral injury seems bound to develop, even though money can be only one of the most imperfect equivalents, and sometimes even a shocking one, for wounded affection, for lack of respect for the dead, for defamation.

By taking account of moral injury, whether by allowing it to be made the basis of a tort or quasi-tort, or by admitting the existence of contractual obligations corresponding to interests simply moral or of the affections, a capital result is reached, the domain of the law is greatly enlarged. If law is designed (and that is our view) to satisfy the various human aspirations, it is logical to include moral interests, for man does not live by bread alone. He has other things in view than his

[7] *Dorville*, "L'Intérêt Moral dans les Obligations," pp. 10ff., 50ff.

pecuniary interests. Ideas and affection have a considerable importance in his eyes.

The juridical character assigned to moral interest produces another extension of law. The number of individuals entitled to take action to maintain the same right protective of a moral interest quite naturally grows very large. But isolated interest, especially if it is simply moral, is often timid and hesitating; accordingly, in these very cases, relief is supplied in the form of those coagulations of individual rights of action, those varied remedies recognized by the courts, which are exercised by labor unions and similar groups. Let us not enter the difficulties presented by the question of the admissibility of such rights of action.[8]

§ 307. *How the Extension of Reparation Affects Other Fundamental Principles.* What would be the bearings of this validation of moral interests on the other directive principles which govern private law?

Observe, first of all, that the development of moral rights naturally aims at the syndicalization of rights of action.

The recognition of moral interests and of those of affection takes away much of its practical effect from the stiff old adage: He who has no interest has no action. It is much easier to dispense with the application of this rule if a moral interest can be invoked. If law should be modeled on reality, and should not fix a priori certain interests as alone legitimate, that rule becomes almost meaningless. An archæologist would be able to set up the injury caused to him by the demolition of a picturesque building, or an artist his from the entrance of a factory into a beautiful landscape. Rights become popular in the sense of the popular actions of Roman

[8] See *Jean Escarra*, "Recevabilité des Recours Juridictionnels Exercés par les Syndicats et Groupements Analogues."

penal law. Every right will have an infinity of subjects.

There will thus be large numbers of persons united by the bond of a common interest. No single individual will feel sufficiently affected by these interests to take advantage of them in his own person, so the idea of bundling them together, in the hands of a group which will exercise the right of action, is naturally evolved. This is the syndicalization of actions, which tends to appear when many persons have been injured slightly but in exactly the same way; for example, when some one has cast discredit on those who practise a certain profession, or has injured his neighbors as a whole, or all the riparians on a stream. From the social point of view it tends to favor that tendency which is neither one of the State doctrine [étatiste] nor properly individualist: the Syndicalist movement, that is to say, the organization of society into bodies, corporations, or syndicates, that is, collective powers not sovereign, and thereby differentiated from the State.

The principal effect of the protection of moral interests is to favor security. A man will be protected in the ideas and in the sentiments which make up a highly sensitive side of his being in the same way in which he is protected in his material possessions; the little circle within which he is sovereign and free will be better assured to him. But this protection can ordinarily be conceived only as giving static security, and it may come face to face with a corresponding sentiment of dynamic security. There is an opposition which must be settled between the legitimate desire of an individual not to be defamed even by posterity, not to have his honor assailed, and the right of the historian to be free to say anything, to discuss any facts in order to establish the truth.

There is a contradiction, likewise, between the respect

due the home and the advantage in the propagation of new ideas, even though they may be subversive. Here, as elsewhere, the protection of static security is in conflict with the interest of social rearrangement. At the same time that the natural effect of the admission of any precise rule of law favoring possessors shows itself, and static security is developed, in another region private law is readily led to act in the manner of penal law. Nothing is so close as the theories of punitive damages and of the redress of moral injury. As damages have, in such cases, only the function of giving satisfaction — as they have a very indefinite basis, the psychological satisfaction not being measurable — it is easy to conclude that reparation should be sufficient to discourage a repetition of the offense, and the legislator is at times even led to fix the amount of indemnity himself, which makes the latter no more nor less than punitive damages.[9]

§ 308. *How Opposite Obstacles May be Avoided by a Middle Course.* On another side the force of the law is increased. As the number of persons who can act in a particular case is larger, the chances that the law will be respected increase. If a donor may sue to compel the fulfillment of conditions imposed by him in the deed of gift in favor of a third party, if physicians may take action where one of their fellows has been guilty of malpractice, it is more probable that violations of the law will be punished.

On the other hand, as might be expected, the protection of moral interests augments the risks of activity: the

[9] See article 117 of the Penal Code, which provides that the damages for violation of individual liberty cannot be less than twenty-five francs for each day of arbitrary detention.

See on the very close connection between the ideas of the redress of moral injury and punitive damages, *Dorville*, op. cit., pp. 346ff.; *Hugueney*, "L'Idée de la Peine Privée," pp. 65, 57ff., 238ff.

more so in that there is danger, not only of a judgment for damages for a moral injury which has been caused, but that the amount of such a judgment will be necessarily arbitrary to a certain degree. This would create an extremely dangerous condition, were it not for the rôle of imitation, which softens the sharp angles of theory. Our courts are not, in fact, accustomed to give heavy damages for mere moral injury. At the same time, just because of the arbitrary character of the satisfaction given, the idea of justice, conceived as an equality between injury and damages, is excluded, and almost inexorably replaced by a conception close to that of penology — responsibility fixed according to degree of fault.

Furthermore, every enlargement of the domain in which the law rules is evidently a source of complication; it will prejudice economy of time and activity. It increases strife, and the law, embarrassed by the very circumstance that it is trying to extend its empire, is exposed to a loss of force, to the danger of being able to strike only occasional blows; which is one of the most common forms of arbitrary action in all civilizations.

Let us seek a ground for the reconciliation of these opposed ideas. On one side must be taken into account the need of considering moral injury and private moral interest, and on the other the impossibility of proper preventive protection by means of injunctions or enabling orders, and finally the inconvenience of giving too wide a circle of persons the right to compel the repair of moral injuries. One may say that as a compromise between these two different ideas, the restoration of punitive damages would be a logical conclusion, though we do not wish here to recount the history of this institution.[10] Precisely because it is its nature to be fairly

[10] See in this subject *Hugueney*, "De la Peine Privée en Droit Contemporain."

regular does it escape being too arbitrary.[11] It does away with the often difficult calculations of the amount of damages, thus satisfying the law of economy of effort.[12] By its high figure it fully satisfies the persons interested and tends to diminish the number of those entitled to claim it. The system of punitive damages is available only to a single individual or to a personified group, which prevents the multiplication of suits, respecting, here again, the law of economy of effort. Finally its punitive quality lessens the chances of repetition of infractions by intimidating possible imitators. It is thus singularly fortunate in grouping on a new ground the advantages sought by different needs; and the only thing against it is the high amount, which looks formidable at first sight, and so discredits it to a generation which wants to soften everything. It really constitutes a grave risk to run for those whose activity may morally injure others, but a risk which may be lessened by the power of the judge to exercise his discretion between a fixed minimum and maximum, in estimating the degree of fault. It offers a happy compromise for arbitrary restraint. Nevertheless, favoring as it does static security, it is inimical in a certain degree to activity, and a part of the desiderata we have indicated fail to be satisfied.

[11] Compare ibid., p. 329.

[12] See *Jhering*, "Œuvres Choisies," French transl. by Meulenaere, vol. ii, p. 157.

CHAPTER XXIII

CONCLUSION

THE TENDENCY TO OVERSIMPLIFICATION: FICTIONS OF UNITY AND OPPOSITION — IMPOSSIBILITY OF A STABLE EQUILIBRIUM — COMPROMISE, NOT LOGICAL SYNTHESIS, THE GOAL OF JURIDICAL EFFORT — IMPORTANCE OF LEGAL TECHNIC.

"We here reach those whirlpools of the human mind in which man is tossed from one contradiction to another. Having come so far one should halt."

Renan, "Dialogues Philosophiques," p. 147.

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§ 309. *The Tendency to Oversimplification: Fictions of Unity and Opposition.* This rapid examination of the principal ideas that come into play in the theory of private law makes it now possible to express conclusions with greater force.

The simplicity which our minds require[1] does not appear to be the law of the exterior world. It is a proceeding for acquiring knowledge, a necessary logical mode of knowledge, a method of teaching, a means of investigation — for hypothesis is the basis of discovery. There is no proof, on the other hand, that it is the law of things.

The simplist[2] theories — such as those of a world steadily advancing, of a world of infinite perfectibility,

[1] Compare *Tarde*, "Les Lois Sociales," RMM 1898, p. 342.

[2] [The author's word is here retained, in view of the lack of any equivalent term, short of awkward paraphrase, for the self-explanatory notion of "simplism."—TRANSL.]

of solidarity and fraternity unfolding themselves ever more and more — seem just as exaggerated as the dueliistic theories, if I may be permitted to coin a word, which see everywhere in life a struggle between two opposite principles — individualism and socialism, authority and liberty, progress and reaction, State and individual. Correct as approximations, as methods of instruction, these duels, if closely examined, are really battles between masses, certain parts of which support or oppose just as well one as the other of the two combatants.[3]

In the presence of this infinite complexity which is the law of facts, it therefore results, inevitably, that the theories which pretend to a complete simplicity, to a rigorous unity, in their preoccupation with one thing, are certain to receive sudden checks and to go to rest in the already overcrowded mausoleum of human dreams. Consequently there has existed for a long time a vague consciousness of an opposition of things which has to be reckoned with. Some state particular oppositions[4]; other recognize the diversity but seek behind it a general harmony in results.[5] Still others, yielding only for form's sake to the laws of the mind, end in referring everything only to "the largest and most comprehensive verbal unity," to that philosophic generalization which sums up most completely, and under the most appropriate terms, the infinite complexity of diverse elements without entirely covering them.[6] Others, again, seek to discover, at least from the technical point of view, or from that

[3] There is a very complete exposition of the simplistic or dualistic [sic] theories of the basis of law in *Boistel*, "Philosophie du Droit," vol. i.

[4] See *Lasalle*, "A propos de la Théorie de l'Hérédité," cited by *Jhering*, "Études Complémentaires du Droit Romain," vol. iv, p. 93.

[5] See *Jhering*, "Zweck im Recht," French ed. p. 29. Compare *Van der Eycken*, "Méthode Positive d'Interprétation," p. 333; *Bouglé*, "La Crise du Libéralisme," RMM 1902, p. 639.

[6] *Tanon*, "L'Évolution du Droit et la Conscience Sociale," pp. 163, 164.

of the structure of rights, the abiding abstract juridical elements.[7]

It is therefore not surprising that latterly a student of the theory of the State[8] observed "the most disconcerting amalgamations, traces of the interpenetration of adverse doctrines, in a great number of books." He sees in this a proof of the persistent and increasing uncertainty of ideas.

Must we resign ourselves to this state of affairs, satisfying neither our mental needs of simplicity nor the dynamic needs of the practical and even moral life, which calls for a rule?

§ 310. *Impossibility of a Stable Equilibrium.* Society is torn between many differing and opposite needs, connected with the requirements of security and change, and with economy of effort. It admits that human life should be respected, that it has a value; this postulate established, it takes life by war, by capital punishment, and more often indeed, as is too frequently forgotten, by the forced unhealthfulness of its industries, by the ever multiplying accidents of its constantly greater activity.

Society should seek to banish violence; but too great a peace is dangerous, and men must be ready to defend their rights, to reëstablish even by force balances too plainly upset. We scarcely pity those who do not dare so much.[9]

It should develop the juristic spirit, the spirit of logic, but at the same time the critical spirit which sees reality.[10]

So it is with the liberty which is said to be indispensable

[7] See *Picard*, "Le Droit Pur"; *Roguin*, "La Règle de Droit."

[8] *Henry Michel*, "L'Idée de l'État," pp. 529ff.

[9] See the reflections of *Sorel* on violence, "Mouvement Socialiste," 1906, vol. i, p. 29.

[10] See *Lévy-Ullmann*, "Programme d'Introduction à un Cours de Droit Civil," RDC 1903, p. 838.

to every civilized group,[11] and so it is with everything which society venerates, respects, and attacks simultaneously.

Is this all mere matter for a display of cleverness,[12] or is it the most disturbing of problems?

I do not think, as Bentham in spite of his excellent practical sense imagined could be done,[13] that anyone will ever completely succeed in classifying these various interests accurately and always in the same way, inasmuch as security and equality should with the passage of time become reconciled, and equality must provisionally give way to security.

That clearly defined classification which he drew from pyschology does not seem to us unchangeable, like the old classical laws of orthodox political economy. It would be rather a center of attraction, from which one would deviate more or less in different directions. I do not even think that law can be regarded a trustworthy notation of the different values of interests under consideration.[14] For these values are in part attributed to them by our own temperament,[15] and consequently possess a certain variability.

In the opposition which ideas cause to arise at a given moment, the law of simplicity of the mind discloses a conflict bound to end in the death of the vanquished. This is an error. Each one of the sentiments is rooted in the needs of human nature, and the conquered one has a right to its revenge. As slaves, in the times of the Saturnalia, got their few days' compensation for

[11] See *Schatz*, "L'Individualisme," p. 317.

[12] This would not date from the present time: see *Laboulaye*, "Le Prince Caniche," chap. v.

[13] "Principes du Code Civil," ed. Dumont, chaps. vi, xi, and xii. [See chap. xvii, footnote 7, p. 503 ante.— Ed.]

[14] See to the contrary *Van der Eycken*, "Méthode Positive d'Interprétation," p. 76.

[15] Compare *Hauriou*, "Science Sociale Traditionnelle," p. 102.

the burden of a long obedience, so rejected ideas must retake, sooner or later, a part of their lost ground; whence comes that satisfaction, to a certain extent, of contradictory desires which is completed by illusion and hope. Besides, this strife is not fruitless. It has already been noted that, between identity and flat contradiction, both sterile, there is a chain of intermediaries in part fruitful.[16] From the strife of the elements which they contain, from their oppositions brought to light through speculation and experience, is born that slow process of change which we call evolution, or the abrupt outbursts of revolution. Change must come, for social equilibrium is instable, since everybody always obtains either too much or too little. Thus in the continual movement which is life, as in the walk of any living being, equilibrium is realized by means of successive disequilibria which are limited in different ways. Accordingly, though no decision can be affirmed to be absolutely permanent, many exist only to be modified, or attain new values under different names. And so, to carry out the thought more fully, we see that we must accept certain contradictions,[17] that we must grasp firmly opposing principles to be accepted only as general tendencies, which for the moment, according to circumstances, will either acquire a large domain through wholesome conquests or become contracted.

The never ending conflict for law is thus accounted for.[18]

Accordingly our minds which aspire to precision, and the public which demands of science formulæ great and small for the attainment of exact results,

[16] *Paulhan*, "La Logique de la Contradiction," RP 1910, p. 129.

[17] *Paulhan*, ibid. p. 292. Especially the examples which he gives à propos of Bossuet and Friedel.

[18] *Jhering*, "Der Kampf ums Recht." Compare *Picard*, "Le Droit Pur," p. 260.

can never be satisfied. Such certainty is impossible. Study will show how to keep clear of certain errors, without always fixing the exact and certain truth; it shows us that there ought to be a general equilibrium — not the mawkish peace in which every one is calm, relying on others for the happiness of all, but rather the peace of an evening after a battle, or of two adversaries who measure their forces; it shows us a succession of states of disequilibrium, which sometimes give way to one another by violence, and tend in different directions.

What shall we finally conclude from the practical point of view? Are there no points to bring out in regard to this middle ground between divergent principles? Is the contest between hostile ideas always sharp? Not at all; theories born of human needs, although corresponding to an objective reality in regard to which it is hard to express an opinion, appear like the trees of a forest, which though not numerous underneath divide and subdivide into many intertwining branches overhead. Sometimes the branches of opposite trees converge toward the same point, sometimes they separate. Likewise the subdivisions of the same theories now lend themselves to reconciliations, to happy congruences with different theories, and now they are opposed. Nature and the moral world seem to unite complex elements and to compel them to live together more or less harmoniously.

§ 311. *Compromise, Not Logical Synthesis, the Goal of Juridical Effort.* May we hope that the human brain will one day be strong enough to unite in one harmonious synthesis the elements on which law depends? I do not believe that it is possible. We can make fortunate reconciliations — an effort which is even facilitated by the shut-in character of every society[19]; but we must

[19] See *Hauriou*, "Science Sociale Traditionnelle," p. 122.

be conscious of their imperfection, remembering that thought of Montesquieu with which he has headed a chapter — that we must not correct everything.[20] To bring about reconciliations is, nevertheless, the great rôle of jurists. We may hope to make contrary principles live together willingly or under compulsion, by cutting out a little here and a little there. Of course this makes the law a subtle science, but it cannot be avoided, and as Montesquieu says, "It is not surprising to find in the laws of [well regulated] States so many rules, restrictions, and extensions, which multiply particular cases and seem to make an art of reason itself." That subtlety with which law has been so often reproached, and which is an evil, may be a protection against greater evils, and may be compensated by giving occasional satisfaction to the needs of simplification. As Montesquieu observed, despots alone try to govern everything with a general scheme of behavior and a rigid will. Without doubt these complexities are often a defect. "In proportion to the multiplication of judgments, the law of the courts is weighted down by decisions which are often contradictory either because succeeding judges differ in opinion, or because similar cases are now ably, now badly defended, or because of the infinity of abuses which slip into all that passes by the hand of man. This is an unavoidable evil which the legislator corrects from time to time."[21]

Let us not call, then, the goal of our juridical efforts a stable equilibrium. The perfect balance of the scales occurs only as an exceptional manipulation of forces in the physical world. The moral and physical worlds are made up only of approximate equilibria. As the seasons are regularly composed of an infinite irregularity

[20] "Esprit des Lois," Book xix, chap. vi.

[21] "Esprit des Lois," Book vi, chap. i.

of atmospheric changes, so the balance between the social world and the most lasting aspirations of the human mind can be brought about by means of continual, varied disturbances of equilibrium.

That is the complex law of life which we can perceive indistinctly but cannot clearly express. Because of it the different theories of life which have been half perceived by the masters, then seen by the hypnotized gaze of their disciples, have all sadly declined one after the other.

What shall the law do, that science which pushes research to the point of pretending to settle the infinitely small conflicts of daily existence so as to bring about security?

It may hope to make, by the exercise of ingenuity, small or medium-sized constructions in which the different materials will be happily combined; it will settle conflict by applying a precise though temporary solution, and it may even respond more particularly to the tastes of a given epoch and give them a certain style.[22] It cannot, however, combine everything so that nothing will be left outside it of the force which will wear away or tear down the edifice. There will always remain something after these reiterated attempts, these heaped up ruins. Certain human needs will still appear to be of special importance, although they will sometimes have remained for a long time unsatisfied, and although the history of society abounds in paradoxes, in situations without equilibrium which have lasted long.

§ 312. *Importance of Legal Technic.* On another side law can perfect its technic, that is to say its methods of perfectly attaining an end, or even several ends simultan-

[22] Has not *Pothier* the limpid elegance of the Louis XVI style, and have not the jurists of the early 1800s all the stiffness of the style of the Empire? Law, like art, is bound up with the civilization which brought it into being.

eously. This is the only side on which it is certain that progress is possible.[23] What is the value of these ends? That is another point much harder to settle. In every case the arts, like law, can be perfected more especially from the point of view of technic. After all, has anyone ever defined beauty? Nevertheless there are beautiful works which have been regarded as such for centuries.

This is not everything. It is nothing that can satisfy the thirst for infinity in the soul of man. But beyond, in the realm of the unknown — in which we need not express the importance to be assigned to the unknowable — there remains what Antiquity, in default of aught else, left at the bottom of Pandora's box: Hope eternal.

[23] Compare *Sorel*, "Les Illusions du Progrès," p. 49.

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